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No. 11-9533

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

US MAGNESIUM LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent,

ON PETITION FOR REVIEW OF A FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EPA'S FINAL MERITS BRIEF
(DEFERRED APPENDIX APPEAL)

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

The United States Environmental Protection Agency is aware of no prior or related appeals.

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GLOSSARY OF ACRONYMS

BACT	Best Available Control Technology
CAA	Clean Air Act
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emissions Standards for Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NSPS	New Source Performance Standards
$PM_{2.5}$	Particulate Matter Less Than a Nominal 2.5 Micrometers in Diameter
PM_{10}	Particulate Matter Less Than a Nominal 10 Micrometers in Diameter
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
UDAQ	Utah Department of Air Quality

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JURISDICTION

Section 307(b)(1) of the Clean Air Act ("CAA") provides the appropriate United States Court of Appeals with jurisdiction to review final actions of the Environmental Protection Agency ("EPA") that are locally or regionally applicable. 42 U.S.C. § 7607(b)(1). US Magnesium LLC challenges a final EPA action solely concerning the State of Utah's plan to attain and maintain air quality standards under the CAA. The petition was timely filed. Therefore, if any court has jurisdiction over the petition, it is this Court. However, this Court lacks jurisdiction to review the petition because US Magnesium has not demonstrated that it has standing to bring the petition.

STATEMENT OF THE ISSUES

1. Whether US Magnesium has demonstrated its standing to bring this petition.

2. Whether EPA reasonably determined that the Utah breakdown exemption, which exempts air pollution sources from complying with continuously applicable emissions limitations during periods of equipment malfunctions, renders Utah's plan for attaining and maintaining clean air standards substantially inadequate to do so when the emissions limitations are relied on to attain and maintain the air quality standards.

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3. Whether EPA reasonably determined that the Utah breakdown exemption renders Utah's plan substantially inadequate to comply with any other requirement of the CAA when it exempts sources from complying with mandatory emission limitations necessary to prevent the degradation of air quality in clean air areas and to protect visibility in national parks and wilderness areas.

4. Whether EPA reasonably determined that the Utah breakdown exemption renders Utah's plan substantially inadequate to comply with any requirement of the CAA when the exemption prevents adequate enforcement of all emissions limitations, including enforcement by EPA and citizens, and when the exemption applies to federal technology-based standards that already contain whatever exemption is appropriate for breakdown events under those standards.

STATEMENT OF THE CASE

I. Nature of the Case

A. Introduction

Under the CAA, all states must have plans, known as State Implementation Plans ("SIPs"), requiring enforceable emissions limitations and other measures necessary to attain and maintain health-based air quality standards that are promulgated by EPA. Utah's plan contains a provision that completely exempts emissions occurring during unavoidable equipment breakdowns from compliance

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with a source's emissions limitations.

EPA determined under notice-and-comment rulemaking procedures that this exemption renders Utah's SIP substantially inadequate to attain or maintain the air quality standards or otherwise comply with the CAA's requirements. EPA did so, because the exemption is inconsistent with: i) the CAA's fundamental requirement that continuous compliance with SIP-based emissions limitations is necessary to attain and maintain the air quality standards; ii) the CAA's definition of "emissions limitation" as being a *continuous* limitation on emissions; iii) other CAA requirements, including, for example, the requirement that sources must achieve emissions limitations necessary to ensure that air quality in clean areas will not be degraded, and the requirement that emissions standards be enforceable, not only by the State, but also by EPA and citizens; and iv) EPA's technology-based standards for new sources and sources of hazardous air pollutants, which standards already contain whatever exemption is appropriate for breakdown events.

EPA therefore exercised its authority under the CAA to require that Utah revise its breakdown exemption to be consistent with the CAA's requirements. Utah has informed EPA that it intends to do so, and the State has not challenged EPA's final rule.

US Magnesium challenges EPA's final rule in this case. As is shown below,

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US Magnesium has not demonstrated its standing to bring its challenge. As is also shown, US Magnesium's arguments should be rejected even if the Court finds that the company has standing to challenge EPA's final rule.

B. Statutory and Regulatory Background

1. The CAA generally.

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, establishes a comprehensive program for controlling and improving the nation's air quality through a combination of state and federal regulation. Under Title I of the Act, EPA is charged with identifying those air pollutants that endanger the public health and welfare, and that result from numerous or diverse mobile or stationary sources, and with formulating the National Ambient Air Quality Standards ("NAAQS") that establish maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-7409. EPA has established NAAQS for six "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, nitrogen dioxide, lead and ground level ozone. *See* 40 C.F.R. pt. 50. The NAAQS are set at levels requisite to protect public health with an adequate margin of safety and to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 7409(b).

Section 110 of the CAA, 42 U.S.C. § 7410, contemplates that measures

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necessary to attain the NAAQS will be applied to individual sources through a SIP prepared by each State, subject to EPA review and approval, for each "air quality control region" within the State. *Id.* A SIP must include enforceable emissions limitations and other control measures necessary to attain and maintain the NAAQS for each pollutant. *Id.* §§ 7410(a)(2)(A) - (K).[1/] "Emission limitation" is defined in part as a requirement "which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *Id.* § 7602(k). Once the emissions limitations and control measures are approved by EPA they are federally enforceable. 42 U.S.C. § 7413. The approved Utah SIP may be found at 40 C.F.R. pt. 52, sbpt. TT.

2. Requirements for Nonattainment Areas.

EPA designates areas of the country as "attainment" or "nonattainment" depending upon whether or not they met the NAAQS for a particular pollutant. 42 U.S.C. § 7407(d). Part D of the CAA contains general requirements for all nonattainment areas, as well as NAAQS-specific requirements. *Id.* at §§ 7501-7514a. Among the general statutory requirements for all nonattainment areas is the

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[1/] A SIP must provide for State enforcement of the emissions limits and other control measures contained in the SIP. 42 U.S.C. §§ 7410(a)(2)(C). Congress also provided for enforcement of those measures by EPA and citizens. *Id.* at §§ 7413, 7604(a)(1), (3).

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requirement that attainment be achieved as expeditiously as practicable, but no later than 5 years from the date the area was designated as nonattainment, and the requirement that annual incremental progress, known as "reasonable further progress," towards attainment be achieved until attainment is reached. *Id.* at §§ 7501(1), 7502(a)(2)(A), 7502(c)(2). Before a nonattainment area may be redesignated to attainment status, the State must develop and submit to EPA for approval a maintenance plan to ensure that the area retains that status. 42 U.S.C. § 7505a. Once they are redesignated, these areas are often referred to as "maintenance areas." Utah contains attainment areas, maintenance areas and nonattainment areas. 40 C.F.R. § 81.345.

3. Prevention of Significant Deterioration Requirements.

For major sources in attainment areas, the Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. §§ 7470-7492, is intended "'to ensure that the air quality in attainment areas or areas that are already 'clean,' will not degrade.'" *Alaska Dept. of Envt'l Conservation v. EPA*, 540 U.S. 461, 470 (2004) (citation omitted). A PSD permit must be obtained prior to construction or modification of large pollutant-emitting facilities[2/] often referred to as "major

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[2/] A "major emitting facility" for the PSD program is one that emits either 100 tons per year or 250 tons per year of any pollutant regulated under the Act,

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sources," and the applicant is required, among other things, to demonstrate that the proposed new or modified source will not cause a violation of the NAAQS or "PSD increments" (*i.e.*, limits on increases in ambient pollution concentrations over specified area-specific baseline concentrations), *see* 42 U.S.C. §§ 7473, 7475(a)(3) and 7476.[3/] The source must also implement the "best available control technology" (or "BACT") to limit emissions of each pollutant regulated under the CAA. 42 U.S.C. § 7475(a)(4); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. at 468. Additional emissions limitations may be imposed as necessary to protect visibility in Class I areas, such as national parks. 42 U.S.C. § 7475(d).[4/]

[2/](...continued)
depending on the type of facility. *Id*. § 7479(1). *See also* 40 C.F.R. § 51.166(b)(49)(iv).

[3/] In addition, under CAA section 110(a)(2)(C), SIPs must provide for the regulation of the modification and construction of *any* stationary source as necessary to assure that the NAAQS are achieved. *Id.* at § 7410(a)(2)(C). Thus, all States must have programs to regulate the construction or modification of minor sources, which are sources that have the potential to emit a relevant pollutant below the relevant major source thresholds. *Id. See also* 40 C.F.R. § 51.160(a) (requiring that each State have enforceable procedures to ensure that the construction or modification of a minor source will not, among other things, interfere with attainment or maintenance of any NAAQS).

[4/] For nonattainment areas, major new and modified major sources are subject to the more stringent nonattainment new source review. 42 U.S.C. §§ 7502, 7503. Such source must meet the Lowest Achievable Emission Rate and must obtain
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4. New Source Performance Standards.

In addition to the health-based NAAQS, which are implemented through SIP control measures, Congress has provided for Federal technology-based standards for new sources. These standards are not based upon what is necessary to achieve the NAAQS, but rather upon the emissions reductions achievable through specific technologies.

Under CAA section 111, New Source Performance Standards ("NSPS") are technology-based standards that apply to stationary sources that are constructed, modified, or reconstructed after the standard is proposed. 42 U.S.C. § 7411(a)(2). NSPS must reflect the degree of emission limitation achievable through the application of the best system of emission reduction which the Administrator determines has been adequately demonstrated, taking costs and other factors into account. *Id.* at § 7411(a)(1). Utah has been delegated the authority to implement the Federal NSPS with respect to sources within the State. 40 C.F.R. § 60.4(c).

5. Standards for Hazardous Air Pollutants.

Under CAA section 112(c), EPA is required to list source categories for major sources of hazardous air pollutants (*e.g.*, benzene) and set a National

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[4/](...continued)
sufficient emission reductions from existing sources to offset its increased emissions. *Id.* §§ 7502(c)(5) and 7503.

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Emissions Standard for Hazardous Air Pollutants ("NESHAP") for each source category under CAA section 112(d). 42 U.S.C. § 7412(c), (d). As with the NSPS, these are technology-based standards and are not set based on reductions needed to meet the NAAQS. Under CAA section 112(d)(2), the NESHAPs must require the maximum degree of reduction in emissions of the relevant hazardous air pollutants that is achievable, taking costs and other factors into account. *Id.* at § 7412(d)(2). These are commonly called "MACT" standards. *See Sierra Club. v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008). CAA section 112(f)(2) requires EPA to review the NESHAPs within eight years of their promulgation and tighten them as necessary to ensure they adequately protect health and the environment against the effects of the hazardous air pollutants. 42 U.S.C. § 7412(f)(2).

6. SIP Calls.

Under CAA section 110(k)(5), 42 U.S.C. § 7410(k)(5), whenever EPA finds that a SIP for any area is substantially inadequate to attain or maintain the relevant NAAQS, or to comply with any other requirement of the CAA, EPA must require the State to revise the SIP as necessary to correct the inadequacy. This is referred to as a "SIP call." *See Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1355 (11th Cir. 2006) (noting that EPA may issue a SIP call under CAA section 110(k)(5) if it determines that a SIP's breakdown provision is inconsistent with

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EPA's current interpretation of the CAA's requirements). If EPA issues a SIP call, then it must notify the State of the SIP's inadequacies and it may provide the State with a reasonable deadline, but no more than 18 months, to submit a revised SIP curing the inadequacies. 42 U.S.C. § 7410(k)(5).[5/] If the State fails to make the required SIP revision or if EPA disapproves the revision, then EPA must promulgate a Federal Implementation Plan ("FIP") within two years after the State fails to make the revision or EPA disapproves the revision. *Id.* at 7410(c)(1).

7. EPA's Excess Emissions Policy With Respect to Startups, Shutdowns and Malfunctions.

Under EPA's longstanding interpretation of the CAA, SIPs must provide that excess emissions resulting from malfunctions constitute violations of the underlying emissions limitations, but a State may exercise enforcement discretion or provide the source an affirmative defense to a claim for civil penalties for such violations. *See* Joint Appendix ("JA") 161, 163 (Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction (Sep. 28, 1982)) ("1982 Bennet Memorandum"); JA 156, 158-59 (Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction (Feb. 15, 1983)) ("1983 Bennett

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[5/] CAA section 110(a)(2)(H) provides that SIPs must provide for revisions under certain circumstances, including when EPA issues a SIP call. *Id.* at § 7410(a)(2)(H)(ii).

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Memorandum"); JA 141-43, 145-48 (State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999)) ("Herman Memorandum"); JA 131-32 (Re-Issuance of Clarification - State Implementation Plans (SIPS): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdowns (Dec. 5, 2001) ("Schaeffer Memorandum"). *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1129-30 (10th Cir. 2009) (upholding EPA's interpretation of the CAA with respect to malfunctions in a challenge to a site-specific FIP for the Four Corners Power Plant); *Michigan Dep't. of Envtl. Quality v. Browner*, 230 F.3d 181, 183 (6th Cir. 2000) (upholding EPA's interpretation of the CAA with respect to startups, shutdowns and malfunctions in a challenge to EPA's disapproval of a Michigan SIP revision).[6/]

EPA's interpretation is based in part upon CAA section 110(a)(1), 42 U.S.C. § 7410(a)(1), which requires SIPs to provide for attainment and maintenance of the NAAQS. *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1129 ("The longstanding policy makes clear that excess emissions resulting from malfunctions are violations of the Clean Air Act, for such emissions can interfere with attainment of the

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[6/] While the policy memoranda also address excess emissions occurring during startup and shutdown events, the Utah rule at issue here only establishes a breakdown exemption. 75 Fed. Reg. 70,888, 70,889 n.1 (Nov. 19, 2010).

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national air standards."); JA 158, 163 (Attachment to 1982 and 1983 Bennett memoranda at 1) (explaining that an automatic exemption for a malfunction might aggravate air quality such that the SIP no longer provides for attainment of the ambient air quality standards); JA 142 (Herman Memorandum at 2) (explaining that EPA cannot approve an affirmative defense provision for malfunctions that does not allow the imposition of injunctive relief because this would undermine the fundamental requirement of attainment and maintenance of the NAAQS). As EPA further explained in the notice-and-comment rulemaking at issue here, the interpretation is also based upon CAA section 302(k)'s requirement that emissions limitations must limit pollutants on a continuous basis. 75 Fed. Reg. at 70,892/1; 76 Fed. Reg. 21,639, 21,641/2 (Apr. 18, 2011).

8. Utah's Unavoidable Breakdown Exemption.

Utah's unavoidable breakdown exemption applies across-the-board to both major and minor sources, to all of the NAAQS pollutants, and to non-NAAQS pollutants, such as hazardous air pollutants. Utah Admin. Code R307-107-1. It provides that "emissions resulting from an unavoidable breakdown will not be deemed a violation of [the Utah air quality] regulations." *Id.* Breakdowns that are caused entirely or partly by poor maintenance, careless operation, or other preventable upset conditions or preventable equipment breakdown are not

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considered unavoidable breakdowns under the rule. *Id.*

The rule contains reporting requirements with respect to breakdowns lasting more than two hours. *Id.* at 107-2. The rule provides that the Executive Secretary of Utah's Air Quality Board shall use the information reported in determining whether a violation has occurred and/or the need for an enforcement action. *Id.*

The rule requires that sources experiencing a breakdown must assure that emissions limitations are exceeded for only as short a time period as is reasonable. *Id.* at 107-4. Sources must take all reasonable measures, including possibly the curtailment of operations if necessary to limit "the total aggregate emissions from the source to no greater than the aggregate allowable emissions averaged over the periods provided in the source's approval orders or R307." *Id.*[7] If operations cannot be curtailed so as to limit emissions without jeopardizing equipment or safety or if measures to be taken would result in greater excess emissions, then the source shall use the most rapid, reasonable procedure to reduce emissions. *Id.*

C. Factual Background

EPA first reviewed a variation of Utah's unavoidable breakdown exemption in 1979, which is prior to the time that EPA issued its memoranda setting forth its

[7] EPA understands an approval order to constitute a permit under Utah's procedures. R307 constitutes the entirety of Utah's air quality rules.

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interpretation of the CAA's requirements with respect to unavoidable breakdowns. 44 Fed. Reg. 28,688, 28691/3 (May 16, 1979). *See also* 75 Fed. Reg. at 70,890/3 (discussing previous approvals). EPA stated in the 1979 notice of proposed rulemaking that any exemptions granted through the Utah rule would not apply as a matter of Federal law. 44 Fed. Reg. at 28,691. Similarly, in 1980, when EPA issued its final rule approving the Utah breakdown exemption, EPA stated that exemptions granted under the rule "may not be approved by EPA." 45 Fed. Reg. 10,761, 10,763 (Feb. 19, 1980). *But see* 75 Fed. Reg. at 70,890/3 (questioning both how EPA had reached this conclusion and whether a court would honor the interpretation).[8/]

After EPA issued the Herman Memorandum, EPA requested that Utah address EPA's concerns with the Utah breakdown exemption. JA 136, 139 (Letter

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[8/] Subsequently, on two occasions, EPA approved Utah's renumbering of its entire SIP, which included a variation of the Utah breakdown exemption, although EPA did not then consider the substance of the exemption. 59 Fed. Reg. 35,036 (Jul. 8, 1994); 70 Fed. Reg. 59,681, 59,683-685 (Oct. 13, 2005). *See* 75 Fed. Reg. 70,890/3 (discussing 1994 and 2005 actions). In its 2005 action, EPA explained that it was engaged in discussions with Utah regarding EPA's concerns with some provisions of the SIP and that approving the renumbering would facilitate future discussions. 70 Fed. Reg. 59,683/1. EPA specifically stated that it would continue to require Utah to correct any deficiencies in the SIP notwithstanding EPA's approval of the State's renumbering system. *Id.* *See also* 75 Fed. Reg. at 70,890-891 (discussing 2005 action).

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from Richard R. Long, Director, Air and Radiation Program, EPA Region VIII to Rick Sprott, Acting Director, Utah Division of Air Quality ("UDAQ") (Oct. 6, 2000) at 4). Utah agreed that the rule could "benefit from clarification." JA 133, 134 (Letter from Richard W. Sprott, Director, UDAQ to Richard R. Long, Director, Air and Radiation Program, EPA Region VIII (Jan. 22, 2001) at 2).

In 2004, Utah proposed to amend the Utah breakdown exemption in response to EPA's concerns. JA 77 (Notice of Public Hearing, Excess Emissions, DAQPN-013-04). EPA provided Utah with written comments on the proposed amendment indicating that EPA would be unable to approve it because, among other things, it did not treat all excess emissions as violations. JA 59-61 (Letter from Richard R. Long, Director, Air and Radiation Program, EPA Region VIII to Rick W. Sprott, Acting Director, UDAQ (Oct. 22, 2004)). Various industrial interests in Utah also submitted negative comments on the proposed revision and, as a result of the comments it received from both EPA and industry, Utah requested a stakeholders meeting to be attended by industry representatives and officials from EPA and Utah. JA 57-58 (Electronic mail message from Richard Sprott to Richard Long and others (Dec. 9, 2004)). Such a stakeholders meeting was held on January 19, 2005, at which EPA and industry representatives made presentations. *See* JA 53 (Sign-in sheet for Excess Emissions Meeting, January 19,

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2005).

While EPA and Utah continued to discuss possible amendments to the rule following the stakeholders meeting, Utah eventually acknowledged that it was unable to make progress with industry and Utah recognized that EPA might have to undertake a SIP call concerning the exemption. JA 22 (Memorandum, Utah Unavoidable Breakdown Rule File, August 2, 2006, Midyear Call (Sept. 9, 2010)). In 2008, the Utah Air Quality Board decided to maintain the Utah breakdown exemption without change. JA 43 (Memorandum to Air Quality Board from Kimberly Kreykes, Utah Department of Environmental Quality, Five Year Reviews: R307-107. General Requirements: Unavoidable Breakdown (Aug. 12, 2008)).

On December 31, 2007, an environmental group petitioned EPA to issue a SIP call to require Utah to revise the Utah breakdown provision as necessary to meet the requirements of the CAA. On September 3, 2009, the same group filed an action against EPA in federal district court alleging, among other things, that EPA had unreasonably delayed action on the administrative petition within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 555(b), and 706(1). *Wildearth Guardians v. Jackson*, Civ. No. 09-cv-02109 (D. Colo.). On March 9, 2010, the court entered a consent decree that required EPA to sign a notice of final

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rulemaking action by a specified date to determine whether the Utah breakdown exemption renders the Utah SIP substantially inadequate within the meaning of CAA section 110(k)(5). *Id.* Docket Entry 22.

On November 19, 2010, EPA published a notice of proposed rulemaking in which it proposed to find that the Utah SIP was substantially inadequate due to the Utah breakdown exemption and therefore to call the SIP under CAA section 110(k)(5). 75 Fed. Reg. 70,888. On April 18, 2011, EPA published its final rule in which it called the Utah breakdown exemption under CAA section 110(k)(5). 76 Fed. Reg. 21,639. Utah has informed EPA that it will revise the Utah breakdown exemption consistent with EPA's final rule.[9/]

STANDARD OF REVIEW

In order to prevail on the merits, Petitioner must show that EPA's final rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1122-23. While the Court's inquiry into the basis of the agency's decision is

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[9/] *See* Electronic mail message from Dave McNeill, UDAQ to Monica S. Morales, Unit Chief, Air Quality Planning Unit, EPA Region 8 (June 15, 2011), transmitting a message from Bryce C. Bird, Director, UDAQ, which is included in the addendum hereto. This document was received by EPA after it signed its final rule and is therefore not in the Administrative Record. However, it is relevant to US Magnesium's standing, which is not based upon the Administrative Record.

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"'searching and careful, [its] review [under the arbitrary and capricious standard] is ultimately a narrow one.'" *Id.* at 1123 (quoting *Maier v. EPA*, 114 F.3d 1032, 1039 (10th Cir. 1997)). This highly deferential standard presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*).

Questions of statutory interpretation are governed by the familiar two-step test set forth in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1123 ("We review the EPA's interpretation of the Clean Air Act, a statute it administers, under the standards set forth in *Chevron . . . .")*. Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress' intent is clear from the statutory language, the Court must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If, however, the statute is "silent or ambiguous with respect to the specific issue," then under the second step, the Court must decide whether the Agency's interpretation is based on a permissible construction of the statute. *Id*. To uphold EPA's interpretation of the CAA, the Court need not find that EPA's interpretation is the only permissible construction that EPA might have adopted, but rather only that EPA's interpretation is reasonable. *Chemical Mfrs. Ass'n v.*

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NRDC, Inc., 470 U.S. 116, 125 (1985).

EPA's factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could also be supported by the record. *Id*.

SUMMARY OF THE ARGUMENT

The Utah Division of Air Quality has already determined that it will proceed with a revision of the Utah breakdown provision consistent with EPA's interpretation of the CAA. Utah is not a party to this case, and US Magnesium has not shown that Utah will abandon its SIP revision if US Magnesium prevails here. Therefore, US Magnesium's petition should be dismissed for lack of standing because it has not shown that its claimed injury will be redressed by a favorable decision from this Court. However, even if the Court considers the petition, it should deny it.

CAA section 110(k)(5) provides EPA with the discretionary authority to make a judgment call as to whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any requirement of the CAA. Where EPA exercises such discretion and determines the SIP substantially inadequate, EPA must call the SIP. The CAA requires that emissions limitations

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be continuous in nature. EPA reasonably interpreted the CAA to provide EPA with the authority to find the Utah SIP substantially inadequate and call the Utah breakdown exemption because it exempts emissions occurring during breakdowns from compliance both with SIP-based emissions limitations that are relied upon to attain and maintain the NAAQS, and also with emissions limitations that are necessary to prevent the degradation of clean air areas as required under the PSD program. This is a reasonable interpretation of the discretionary authority provided under CAA section 110(k)(5) and it should be upheld under step 2 of *Chevron*.

EPA also reasonably determined that the Utah breakdown exemption is substantially inadequate to comply with the CAA's requirement that emissions limitations be enforceable, not only by the State, but also by EPA and citizens. EPA further reasonably determined that the Utah breakdown exemption is substantially inadequate to comply with the NSPS and NESHAPS because no further exemption is appropriate beyond what is already contained in those federally-promulgated, technology-based standards. EPA's SIP call should be upheld for these reasons as well.

EPA made its SIP call under notice-and-comment rulemaking procedures in full compliance with the APA's requirements for legislative rules, EPA fully set forth the basis for the SIP call, and the SIP call is consistent with EPA's policies

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and regulations. Therefore, if the Court reaches the merits, it should reject US Magnesium's arguments and uphold the SIP call.

ARGUMENT

I. US Magnesium Has Not Demonstrated Its Standing to Challenge EPA's SIP Call.

US Magnesium bears the burden of proving that it has standing to challenge EPA's SIP call. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1144-45 (10th Cir. 2010) (*en banc*). In order to have standing, US Magnesium must establish that it has suffered an injury in fact: "an invasion of a legally protected interest which is [both] concrete and particularized, . . . and . . . "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, at 560. It must also show that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." Id. at 561.

US Magnesium owns a facility that is regulated under the Utah SIP. It claims to have relied on the Utah breakdown exemption and that a SIP revision that is consistent with EPA's SIP call will not afford it the same level of protection from liability as the Utah breakdown exemption.[10/] While this is arguably

[10/] Addendum to Petitioner's Opening Brief at 26-30, Declaration of David Gibby.

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sufficient to establish injury-in-fact for purposes of the standing requirement, *see Hydro Resources, Inc. v. EPA*, 608 F.3d at 1144-45, US Magnesium has not satisfied the redressability prong of the standing requirement.

US Magnesium asserts that it meets the redressability requirement because if this Court were to vacate EPA's final rule, Utah would not be required to revise the Utah breakdown exemption. Pet's Br. at 18. However, US Magnesium fails to acknowledge that Utah has not challenged EPA's final rule and intends to revise the Utah breakdown exemption.[11/] Utah is not a party here and will not be bound by any ruling in this case.

US Magnesium has not shown that Utah will abandon its revision of the Utah breakdown exemption if US Magnesium were to prevail on the merits here. Therefore, US Magnesium has not shown that its claimed injury – that it will not be afforded the same level of protection from liability under a revised breakdown rule – is likely to be redressed by a favorable ruling in this case. Rather, it is merely speculative that the claimed injury will be redressed and US Magnesium's petition should therefore be dismissed for lack of standing. *See Lujan*, 504 U.S. at

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[11/] *See* Electronic mail message from Dave McNeill, UDAQ to Monica S. Morales, Unit Chief, Air Quality Planning Unit, EPA Region 8 (June 15, 2011), transmitting a message from Bryce C. Bird, Director, UDAQ, which is included in the addendum hereto.

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561-562 (when the existence of the redressability requirement depends upon the exercise of discretion by independent actors not before the court, it is the plaintiff's burden to adduce facts showing the discretion will be exercised in such a manner as to redress the claimed injury). *See also Baca v. King*, 92 F.3d 1031, 1036 (10th Cir. 1996) (plaintiff must show that at least there is a "'substantial likelihood'" that the relief requested will redress the claimed injury) (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978)); *Marshall Durbin Co. of Jasper, Inc. v. EPA*, 788 F.2d 1490, 1492 (11th Cir. 1986) (plaintiffs who discharged wastewater into treatment plant and charged fee lacked standing to challenge EPA grant to utility board to upgrade plant because board could upgrade plant and increase fee regardless of grant). Therefore, US Magnesium's petition should be dismissed. However, even if the Court were to consider the petition, the petition should be denied for the reasons set forth below.

II. EPA Reasonably Called the Utah Breakdown Exemption Because the Exemption Renders the Utah SIP Substantially Inadequate to Attain and Maintain the NAAQS and to Comply with Other CAA Requirements.

US Magnesium does not challenge EPA's long-standing interpretation of the CAA with respect to unavoidable breakdowns. Nor could it successfully do so, as this Court has previously upheld EPA's interpretation as a reasonable one. *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1129-30. Rather, US Magnesium primarily

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argues that EPA was required to present facts demonstrating that the Utah breakdown exemption is preventing Utah from attaining or maintaining the NAAQS. Pet's Br. at 19-31. As is shown below, EPA reasonably interpreted CAA section 110(k)(5) as not requiring such specific factual findings in this case, EPA reasonably called the Utah breakdown exemption and US Magnesium's contrary arguments lack merit.

A. EPA's construction of CAA section 110(k)(5) should be upheld under *Chevron* and its SIP call is supported by the record and reasonably based on reasons related to NAAQS attainment and other CAA requirements.

i. EPA reasonably construed CAA section 110(k)(5) with respect to NAAQS attainment and maintenance and the NSPS program.

CAA Section 110(k)(5) provides that:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard . . . or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.

42 U.S.C. § 7410(k)(5). Congress did not further define the term "substantially inadequate." Accordingly, under CAA section 110(k)(5), EPA must necessarily make a judgment call as to the adequacy of a SIP to attain and maintain the NAAQS or otherwise comply with all other CAA requirements prior to making a

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SIP call. *See id.*

Contrary to US Magnesium's argument, the plain language of CAA section 110(k)(5) does not provide that EPA must find that any NAAQS has been exceeded because of a specific SIP provision before EPA may issue a SIP call. *See* 42 U.S.C. § 7410(k)(5); 76 Fed. Reg. at 21,643/1 ("We are not restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a specific violation can be linked to a specific excess emissions event").[12/] Indeed, Congress provided that EPA must call a SIP *whenever* EPA finds the SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any CAA requirement. 42 U.S.C. § 7410(k)(5). In doing so, Congress clearly vested EPA with proactive authority to protect public health. CAA section 110(k)(5) provides EPA with the discretion to determine when and under what circumstances a previously approved SIP is substantially inadequate to attain or

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[12/] CAA section 110(k)(5) includes the word "findings." It does so for the first time in the third sentence of the section, which provides that "[s]uch findings and notice shall be public." 42 U.S.C. § 7410(k)(5). However, it is clear that Congress there referred back to the first sentence of the section (providing EPA with the authority to call a SIP whenever it "finds" the SIP substantially inadequate to attain or maintain the NAAQS or otherwise comply with any CAA requirement), because that is the only previous time the word "finds" appears in the section. *See id.* Nowhere in the section does it state that EPA must make *specific factual* findings. Thus, the term "findings" refers only to EPA's underlying determination that the SIP is substantially inadequate. It should not be read to require that EPA make specific factual findings before issuing a SIP call.

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maintain the NAAQS or otherwise comply with any requirement of the CAA. *See* 42 U.S.C. § 7410(k)(5). Congress left the type of analysis or methodology necessary for making this determination to EPA's discretion in any particular case. *See id.* This reasonable interpretation of the ambiguous statutory language should be upheld under step 2 of *Chevron.*

The reasonableness of EPA's interpretation of CAA section 110(k)(5) is demonstrated by the SIP call in this case. Attainment areas, maintenance areas and nonattainment areas all exist in Utah. 40 C.F.R. § 81.345. *See also* 76 Fed. Reg. at 21,643/1 (noting existence of nonattainment areas). Under CAA section 110(a)(2), Utah has necessarily relied upon the emissions limitations and control measures in the SIP to demonstrate that it will attain and maintain the NAAQS because that is the statutorily-prescribed purpose of those limitations and measures. *See* 42 U.S.C. § 7410(a)(2); 75 Fed. Reg. at 70,891-892; 76 Fed. Reg. at 21,641/2-642/2. In fact, the Utah SIP contains both generic emissions limits designed to ensure that the NAAQS are maintained in attainment and maintenance areas, along with emissions limits that are specifically designed through air quality modeling to bring nonattainment areas into attainment. 75 Fed. Reg. at 70,891/3: 76 Fed. Reg. at 21,641/2-3. The Utah breakdown exemption directly undercuts the SIP's ability to attain and maintain the NAAQS because it completely exempts sources from

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complying with those emissions limitations at certain times. *Id.* It does not provide for injunctive relief as may be necessary to curtail emissions that may qualify for the exemption but may nonetheless cause or contribute to a NAAQS violation. 75 Fed. Reg. at 70,891/3. In addition, EPA found that the rule's exemption, and its apparent grant of exclusive discretion to Utah to determine whether a violation has occurred, reduces a source's incentive to design, operate and maintain its facility to meet emissions limits at all times. 76 Fed. Reg. at 21,648/3. Therefore, EPA reasonably determined that the Utah breakdown exemption renders the SIP substantially inadequate to attain and maintain the NAAQS. *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1129 ("[E]xcess emissions resulting from malfunctions are violations of the Clean Air Act, for such emissions can interfere with attainment of the national air standards.").

EPA explained that it need not establish a direct causal link between excess emissions resulting from specific unavoidable breakdown events and specific threats to or violations of the NAAQS before it may find the SIP substantially inadequate to attain or maintain the NAAQS within the meaning of CAA section 110(k)(5). 75 Fed. Reg. at 70,891-70,892; 76 Fed. Reg. at 21,643. Rather, EPA explained its interpretation of section 110(k)(5) as protecting the fundamental integrity of the SIP process and structure. Simply put, "it is sufficient that

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emissions limits to which the unavoidable breakdown exemption applies have been, are being, and will be relied on to attain and maintain the NAAQS and meet other CAA requirements." 75 Fed. Reg. at 70,892/1 (footnote omitted). *See also* 76 Fed. Reg. at 21,643 (same). This is clearly a reasonable interpretation of the ambiguous term "substantially inadequate" in CAA section 110(k)(5) in light of the fact that the specific purpose of SIP-based emissions limitations is NAAQS attainment and maintenance. *See* 42 U.S.C. § 7410(a)(2). Accordingly, EPA's interpretation should be upheld under *Chevron* step 2. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (deference is due to agency's interpretation of ambiguous statute when the interpretation is reasonable in light of the statute's text and overall statutory scheme).

Similarly, EPA reasonably determined that the Utah breakdown exemption is substantially inadequate to comply with the mandatory requirements of the PSD program, under which emission limitations are specifically established for major sources in order to ensure that air quality in areas with clean air is not degraded, as well as provisions that protect visibility in Class I areas, such as national parks. 42 U.S.C. §§ 7475(a)(3), (5), 7491. Because the Utah breakdown exemption completely exempts major sources from compliance with all limitations, including those imposed for purposes of meeting PSD and visibility requirements, the

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exemption directly undercuts the mandatory requirements of CAA section 165 and 169A that areas with clean air do not backslide and that visibility be protected in Class I areas.

EPA has previously interpreted the CAA not to allow for exemptions from emissions limits in PSD permits, JA 166 (Memorandum from Edward E. Reich to G.T. Helms regarding Contingency Plan for FGD Systems During Downtime as a Function of PSD (undated)); JA 151 (Memorandum from John B. Rasnic to Linda M. Murphy regarding Automatic or Blanket Exemptions for Excess Emissions During Startup and Shutdowns under PSD (Jan. 28, 1993)), and EPA reasonably determined that the Utah breakdown exemption renders the SIP substantially inadequate to comply with the mandatory requirements of the PSD program in this case. 75 Fed. Reg. at 70,891/3, 70,892/2-3; 76 Fed. Reg. at 21,643 ("[I]n order to ensure non-degradation of air quality at all times under the PSD program . . . it is necessary for a source to comply with its permit limits at all times."). EPA's SIP call should also be upheld for this reason, which is related to, but independent of its determination that the Utah breakdown exemption renders the SIP substantially inadequate to attain and maintain the NAAQS.

EPA interpretation is also supported by CAA section 302(k) when read in conjunction with CAA section 110(a)(2)(A). As explained above, under CAA

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section 110(a)(2)(A), each SIP must contain enforceable emissions limitations as necessary to meet the NAAQS and other CAA requirements such as PSD and the protection of visibility in Class I areas. 42 U.S.C. § 7410(a)(2)(A); 75 Fed. Reg. at 70,892. CAA section 302(k) defines the term "emission limitation" as a requirement established by a State or EPA "which limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous basis* . . . ." 42 U.S.C. § 7602(k) (emphasis added); 75 Fed. Reg. 70,892/1. The Utah breakdown exemption renders the SIP substantially inadequate to attain and maintain the NAAQS and meet the PSD and protection of visibility requirements for Class I areas within the meaning of CAA section 110(k)(5), because it renders emissions limits under the SIP less than limiting on a *continuous basis* and less than fully enforceable. 75 Fed. Reg. at 70,892/1; 76 Fed. Reg. at 21,641. Thus, EPA's interpretation that CAA section 110(k)(5) provides it with the authority to call the Utah breakdown provision is consistent with the CAA's requirement that SIP-based emission limits apply on a continuous basis and is reasonable under step 2 of *Chevron*.

ii. <u>The SIP call is supported by the record.</u>

EPA fully set forth the reasons for its then-proposed SIP call in its notice of proposed rulemaking. 75 Fed. Reg. 70,888 - 70,894. In response to a comment

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that EPA must set forth facts relating a measured or modeled impact on attainment or maintenance of the NAAQS due to excess emissions from a breakdown event, EPA explained in its final rule that section 110(k)(5) does not require that it do so. 76 Fed. Reg. at 21,643/1. Nonetheless, EPA set forth factual information supporting the SIP call.

EPA noted that several counties along the Wasatch Front in Utah are designated as nonattainment for PM_{10}, $PM_{2.5}$ and SO_2 and some of those counties have recorded ozone violations as well. *Id.* The Wasatch Front is subject to severe inversions in winter, which exacerbate these air quality nonattainment problems. The Wasatch Front includes the largest population centers in the State, and EPA found that exceedances of emissions limitations due to unavoidable breakdowns will worsen the area's air quality problems. *Id.*

EPA also noted that the air quality modeling for the State's PM_{10} maintenance plan for Salt Lake County projected values very close to the PM_{10} NAAQS. *Id.* at n.6. A maintenance plan is designed to ensure that areas that have been redesignated from nonattainment to attainment status remain in attainment. 42 U.S.C. § 7505a(a). EPA found that excess emissions from malfunctions are of a particular concern in maintenance areas that model close to the level of the NAAQS. 76 Fed. Reg. at 21,643 n.6.

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EPA also related its experience that excess emissions due to malfunctions can be very large and far exceed SIP-based limits at major sources, such as refineries and power plants. *Id.* at 21,643/2. EPA set forth an example where Holly Refining, in Woods Cross, Utah, emitted nearly 11,000 pounds of SO_2 in a nine-hour period when the emission limitation for the sulfur recovery unit experiencing the breakdown in question was 3,200 pounds of SO_2 per day. *Id.* EPA described a similar experience with a refinery in Montana that emitted thousands of pounds of SO_2 over several hours where the State had modeled attainment for the standard based upon emissions of 150 pounds for a three-hour period. *Id.* EPA explained that these examples are not unique. *Id.*

Finally, EPA noted that a report by the Environmental Integrity Project indicated that malfunction emissions can dwarf SIP and permit emission limits. *Id.* *See also* JA 89, 95, 97-101("Gaming the System," Environmental Integrity Project (Aug. 2004) at 2, 5-9). Thus, while EPA's interpretation of CAA section 110(k)(5) as not requiring that EPA tie malfunction emissions to specific NAAQS attainment or maintenance problems is reasonable and should be upheld, the record also contains factual information that supports EPA's finding of substantial inadequacy. Specifically, attainment, nonattainment and maintenance areas exist in Utah and excess emissions from malfunctions can far exceed the emission limits relied on to

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attain and maintain the NAAQS and meet other CAA requirements.

iii. EPA reasonably found the Utah breakdown exemption to be substantially inadequate to comply with CAA requirements for technology-based standards and for enforcement of emissions limits by EPA and citizens.

In addition, EPA's SIP call is based in part on its determination that the Utah breakdown exemption is substantially inadequate to comply with other CAA requirements. For example, the Utah breakdown exemption is substantially inadequate under CAA section 110(k)(5) because it applies to all regulated pollutants, such as hazardous air pollutants, not just criteria pollutants, and because it applies to the totality of Utah's air pollution control regulations, including the federal technology-based NSPS and NESHAPS, for which the State has delegated authority. 75 Fed. Reg. at 70,892/1-3; 76 Fed. Reg. at 21,643/3. EPA explained that no exemptions from federally promulgated, technology-based standards are appropriate beyond any such exemption established as part of such standards. 75 Fed. Reg. at 70,892/2; 76 Fed. Reg. at *id.* *See also* JA 147 (Attachment to Herman Memorandum at 3 n.6) (explaining that because EPA took technological limitations into account when it set the NSPS and NESHAPS, it would be inappropriate for a State to provide for additional exemptions from the NSPS or

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NESHAPS).[13/] Because CAA section 110(k)(5) allows EPA to call a SIP that is substantially inadequate to comply with *any* CAA requirement, EPA reasonably called the Utah breakdown exemption for this reason as well.

EPA also reasonably determined that the Utah breakdown exemption is substantially inadequate to comply with the CAA's requirements that emissions limitations be enforceable not only by Utah, but also by EPA and citizens. The exemption appears to provide the Utah Executive Secretary with the exclusive authority to determine whether excess emissions are exempt, thereby undermining the CAA's provisions for enforcement by EPA and citizens. 75 Fed. Reg. at 70,892-70,893. Because the State may lack the resources or intention to enforce all applicable CAA requirements, including those necessary for attainment and maintenance of the NAAQS, enforcement by EPA and citizens is a backstop that Congress established to ensure NAAQS attainment and full CAA compliance. Therefore, EPA reasoned that the Utah breakdown exemption is substantially inadequate to attain or maintain the NAAQS or otherwise comply with all requirements of the CAA. *Id.* at 70,893/1. This determination is reasonable under

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[13/] Some of the NSPS do not provide for exemptions during malfunctions. *See* 40 C.F.R. §§ 60.45b(a), 60.46b(a) (NSPS for industrial-commercial-institutional steam generating units with respect to SO_2 and oxides of nitrogen). *See* 76 Fed. Reg. at 21,643/3 & n.8.

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step 2 of *Chevron* in light Congress' express provision for enforcement of SIP-based emissions limitations by both EPA and citizens. *See* 42 U.S.C. §§ 7413, 7604(a)(1), (3). *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. at 666 (deference is due to agency's interpretation of ambiguous statute when the interpretation is reasonable in light of the statute's text and overall statutory scheme).

B. Petitioners' contrary arguments lack merit.

US Magnesium first argues that EPA's final rule is arbitrary because EPA did not define the statutory term "substantially inadequate." Pet's Br. at 22. This argument should be rejected, however, because US Magnesium failed to raise it in its comments to EPA.[14/] *Silverton Snowmobile Club v. United States Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006). Moreover, the argument should be rejected even if the Court considers it.

Had US Magnesium raised the argument, EPA would have explained, as it has in other rulemakings, that, unlike other more technical terms in the CAA, such as "emission limitation," the term "substantially inadequate" may be given its normal everyday meaning. *See* 75 Fed. Reg. 77,698, 77,705/3 (Dec. 13, 2010). As

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[14/] *See* JA 175-189 (Letter from David. W. Tundermann, Counsel to US Magnesium to Callie A. Videtich, submitting comments on EPA's notice of proposed rulemaking (Dec. 30, 2010)).

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explained above, EPA fully set forth its reasoning as to why the Utah breakdown exemption is substantially inadequate to attain or maintain the NAAQS or otherwise comply with the requirements of the CAA within the meaning of section 110(k)(5). There was simply no need or requirement for EPA to further define the term "substantially inadequate" in order for it to make its SIP call in this case.

Thus, this case is unlike *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001), cited by US Magnesium. The Court there remanded certain orders of the FCC establishing a federal funding mechanism to support universal telecommunications services in high-cost areas. The Court found that because the FCC had failed to sufficiently define key terms behind its orders, the Court could not determine whether the orders were reasonably related to the statutory principles. *Id.* at 1202. Unlike that case, EPA here set forth a sufficient basis for its determination that is reasonably related to the principles of the CAA. Indeed, as explained above, EPA's determination is based entirely on CAA principles, such as the fundamental principles that SIP-based emissions limitations are defined to be continuous in nature and are designed to ensure that the NAAQS are attained and maintained at all times. Therefore, the Court should reject US Magnesium's argument that EPA's final rule is arbitrary because EPA did not provide a definition for the term "substantially inadequate."

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More important, US Magnesium's assertion that the term "substantially inadequate" in CAA section 110(k)(5) places some special burden on EPA to find that a SIP is more than merely "inadequate" before it may make a SIP call, *see* Pet's Br. at 22-23, does not support US Magnesium's underlying argument that EPA is required to find, as a matter of fact, that the Utah breakdown exemption has led, or necessarily will lead, to a specific NAAQS exceedance. US Magnesium asserts that by its use of the term "substantially inadequate" Congress raised the degree of "evidence" necessary to support a SIP call, and that "EPA must point to information that, *to a considerable or substantial degree*, calls into question Utah's ability to attain or maintain the NAAQS" before EPA may issue a SIP call. Pet's Br. at 23 (emphasis added). However, there is nothing in CAA section 110(k)(5) that requires EPA to base a SIP call on any specific factual "evidence" at all. Even presuming that US Magnesium is correct that "substantial" means to a "considerable" degree, there is nothing in CAA section 110(k)(5) to suggest that EPA may not find that a SIP is inadequate to attain or maintain the NAAQS to a "considerable degree" when a State completely exempts excess emissions emanating from all stationary sources during malfunction events when the underlying limits were specifically designed to ensure that the NAAQS would be attained or maintained in the first place.

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US Magnesium argues that the discretion EPA has been afforded in other provisions of the CAA makes clear that EPA's discretion is confined under CAA section 110(k)(5). Pet's Br. at 23-24. However, the fact that Congress has chosen to afford EPA with varying levels of discretion in different provisions of the CAA does not support US Magnesium's contention that EPA is required to make specific factual findings under CAA section 110(k)(5) tying the Utah malfunction exemption to a specific failure to attain or maintain the NAAQS. Rather, as explained above, Congress has provided EPA with the authority to make a judgment call under CAA section 110(k)(5) and EPA reasonably exercised the discretion afforded in this case.

US Magnesium cites *BCCA Appeal Group v. EPA*, 355 F.3d 817, 846 (5th Cir. 2003), and *Connecticut Fund for the Env't, Inc. v. EPA*, 696 F.2d 169, 173 (2nd Cir. 1982), for the proposition that EPA has substantial discretion in its review of SIPs under CAA section 110(k)(3). From this, US Magnesium infers that Congress intended to limit EPA's discretion to make a SIP call under CAA section 110(k)(5). Pet's Br. at 24-25.

However, the fact that Congress has afforded EPA with discretion when EPA is deciding whether to approve or disapprove a SIP does not mean that Congress intended to limit EPA's discretion in determining whether a SIP is

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substantially inadequate under CAA section 110(k)(5). As EPA explained in its final rule, section 110(k)(5) is one of the only means Congress has provided for EPA to revisit SIP decisions that may have been wrong or ill-considered or have been brought into more precise focus with the passage of time and the development of relevant knowledge and case law. 76 Fed. Reg. at 21,644/1-2. EPA has the authority to disapprove a breakdown exemption that doesn't comport with EPA's interpretation of the CAA when it is reviewing a SIP submission. *See Michigan Dep't. of Envtl. Quality v. Browner*, 230 F.3d at 183 (upholding EPA's disapproval of a malfunction exemption in a challenge to EPA's disapproval of a Michigan SIP revision). EPA likewise has the authority to find a SIP substantially inadequate and call such a breakdown exemption under CAA section 110(k)(5), even though EPA previously approved it.[15/]

Indeed, the court's reasoning in *Connecticut Fund for the Env't, Inc. v. EPA*,

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[15/] US Magnesium's related argument, that the Federal-State partnership envisioned by the CAA counsels in favor of establishing a heavy burden on EPA when making SIP calls is wrong for the same reason. Pet's Br. at 26. Moreover, EPA did not "come in on a whim and reshape the regulatory landscape" in this case. Pet's Br. at 26. Rather, as set forth above in the Factual Background Section, before issuing the formal SIP call, EPA worked with Utah over a course of years in an attempt to achieve a revision of the Utah breakdown exemption that could meet CAA requirements. Utah understood that EPA might find it necessary to issue a SIP call if the discussions did not prove fruitful. JA 22 (Memorandum, Utah Unavoidable Breakdown Rule File, Utah August 2, 2006 Midyear Call (Sept. 9, 2010)).

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696 F.2d at 173, cited by US Magnesium, Pet's Br. at 25, fully supports EPA's determination here. In discussing the arbitrary and capricious standard of review in the context of EPA's action on a SIP revision, the court reasoned that EPA should be afforded great deference in its construction of the CAA and that the need for flexibility in EPA's administration of the CAA should not be underestimated. *Id.* at 173-74. Therefore, the court defers to EPA's choice of methods to carry out its "'difficult and complex job'" as long as the choice is reasonable and consistent with the CAA. These same principles apply equally to this Court's review of EPA's SIP call.

US Magnesium also incorrectly argues that because EPA must make specific findings before it may delist a source of hazardous pollutants under CAA section 112, 42 U.S.C. § 7412, it must also make specific factual findings for SIP calls under CAA section 110(k)(5). Pet's Br. at 25. However, to the extent the delisting criteria of CAA section 112(c)(9) are relevant at all in this case, they show only that when Congress intended that EPA make specific determinations before taking a particular action under the CAA, Congress carefully crafted the statutory language to require such findings. *See* 42 U.S.C. § 7412(c)(9). Had Congress intended that EPA make detailed factual findings before calling a SIP under CAA section 110(k)(5), it would have included specific language requiring EPA to do

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so. Instead, it required only that EPA find the SIP "substantially inadequate" to attain or maintain the NAAQS or otherwise comply with CAA requirements, and it left the particular analysis or methodology for making this determination to EPA's discretion. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation and quotation marks omitted). Thus, a juxtaposition of CAA section 112(c)(9) with CAA section 110(k)(5) supports EPA's decision in this case.

The available legislative history likewise does not support US Magnesium's arguments. US Magnesium quotes the Senate Report from the CAA as adopted in 1970 to assert that a SIP call may be based solely upon new information developed since the SIP was approved. Pet's Br. at 26. However, CAA section 110(k)(5) did not exist at that time. Rather, CAA section 110(a)(2)(H)(ii), provided that SIPs must provide for revision

> whenever the Administrator finds on the basis of information available to him, that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standards which it implements.

42 U.S.C. § 1857c-5(a)(2)(H)(1970). *See also Commonwealth of Virginia v. EPA*, 108 F.3d 1397, 1407, 1409 (D.C. Cir. 1997), *modified on other grounds*, 116 F.3d

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499 (D.C. Cir. 1997) (discussing previous CAA section 110(a)(2)(H)(ii) and current CAA section 110(k)(5)).[16/] While current CAA section 110(a)(2)(H)(ii) contains similar language, *see* 42 U.S.C. § 7410(a)(2)(H)(ii), CAA section 110(k)(5) was added with the 1990 CAA amendments and therefore the legislative history of the CAA of 1970 is not determinative of Congress' intent with respect to CAA section 110(k)(5).

In addition, while the legislative history of the CAA of 1970 suggests that EPA may make a SIP call on the basis of new information developed after a SIP has been approved, *see* Pet's Br. at 26-27, the actual language of CAA section 110(a)(2)(H)(ii) provided in 1970, and still provides today, that the Administrator may determine that a SIP is substantially inadequate "on the basis of information available to him," not solely on the basis of *new* information. 42 U.S.C. 7410(a)(2)(H)(ii). In contrast, and more important, CAA section 110(k)(5) does not even contain the language "on the basis of information available to him." 42 U.S.C. § 7410(k)(5). Therefore, by adding CAA section 110(k)(5) in 1990, Congress intended that EPA may call a SIP whenever it finds on *any* basis that the

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[16/] Section 110(a)(2)(H)(ii) was amended in 1977 to require that SIPs also provide for revision when EPA determines the SIP is substantially inadequate to comply with any additional requirements established under the CAA. 42 U.S.C. § 7410(a)(2)(H)(ii). *See also Commonweatlh of Virginia v. EPA*, 108 F.3d at 1409 (discussing 1977 amendment).

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SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any CAA requirement. *See id.* Accordingly, US Magnesium is incorrect that EPA may only issue a SIP call based upon new information developed after a SIP has been approved.

US Magnesium cites a number of cases articulating basic principles under the arbitrary and capricious standard of review, such as that an agency's factual findings must be supported by the administrative record and that an agency must articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. Pet's Br. at 27-28. However, US Magnesium does nothing to tie the holdings from those cases to EPA's final rule in this case. *See id.*

Moreover, contrary to US Magnesium's apparent underlying contention, EPA did more than simply quote the language of CAA section 110(k)(5) when it issued its final rule in this case. EPA thoroughly considered the Utah breakdown exemption in the context of the statutory scheme and found the exemption undermines the Utah SIP's ability to ensure compliance with the emission limitations that are fundamental to attaining and maintaining the NAAQS. *See, e.g.*, 76 Fed. Reg. at 21,641/2. EPA further explained that it is not limited to issuing SIP calls in response to NAAQS exceedances or when a specific NAAQS

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exceedance can be tied to a specific excess emissions event. *Id.* at 21,643. EPA also noted that nonattainment areas exist in Utah, maintenance areas that model close to the NAAQS exist in Utah, excess emissions from unavoidable breakdowns occur in those areas, and excess emissions from breakdown events can be very large in comparison to the underlying emissions limitations that are specifically designed to attain and maintain the NAAQS. *Id.* Thus, EPA has clearly explained the underlying basis for its final rule, which is well supported by the record in this case.

Nor does *Commonwealth of Virginia v. EPA*, 108 F.3d 1397, support US Magnesium's arguments here. Pet's Br. at 28-29. In that case, EPA had ordered the States in the Northeast Ozone Transport Region to adopt the California vehicle emissions standards. 108 F.3d 1403. EPA had determined that, due to ozone transport from upwind states to downwind states along with the cascading manner in which ozone is formed along the way, emissions of ozone precursors had to be reduced by 50% to 75% throughout the region in order for serious and severe ozone nonattainment areas within the region to attain the ozone NAAQS. *Id.* at 1401. EPA ordered the California standards to be adopted because it approved the Northeast Ozone Transport Commission's recommendation that such standards be adopted, and because, under CAA section 184, EPA was then required to issue a

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SIP call under CAA section 110(k)(5), requiring the States to revise their SIPs to include the recommended measures. *Id.* at 1402-03. *See also* 42 U.S.C. § 7511c(c)(5). Upon a challenge by Virginia, the court held that EPA lacked authority to order the States to adopt the California standards because, in CAA section 202, Congress had specifically provided that EPA could not require more stringent vehicle emissions standards at that time. 108 F.3d at 1411. The Court determined not to limit its holding to Virginia, which was the only State to challenge the SIP call, because without the emissions reductions that would occur in Virginia, all of EPA's modeling as to the level of ozone precursor reduction necessary to attain the NAAQS across the region would have to be revised. *Id.* at 1414-15. The court was not presented with the argument US Magnesium makes here – that EPA must in all instances make specific factual findings tying the SIP measure it is calling to specific NAAQS exceedances – and it did not rule on that issue. Accordingly, the case has no bearing here.[17/]

[17/] US Magnesium also cites the case for the proposition that EPA cannot "assume" that a SIP provision may prevent a State from attaining the NAAQS. As discussed above, the case does not stand for this proposition. Moreover, EPA has made no such unsupported presumption in this case. Rather, it has determined, among other things, that the Utah SIP is substantially inadequate to attain and maintain the NAAQS when Utah exempts sources entirely at certain times from the very emissions standards that Utah has developed and implemented for the express purpose of attaining and maintaining the NAAQS.

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US Magnesium's arguments with respect to the factual information EPA noted in its final rule are also unfounded. US Magnesium asserts that the excess emissions from the Holly Refining facility did not cause a NAAQS exceedance and that this breakdown event is therefore not the "smoking gun" EPA claims it to be. Pet's Br. at 30. However, EPA never stated that the Holly Refining event led to a NAAQS exceedance. Rather, EPA used the Holly Refining breakdown event as one example demonstrating that excess emissions from breakdowns can greatly exceed a source's SIP-based emissions limits, the purpose of which is attainment and maintenance of the NAAQS. 76 Fed. Reg. at 21,643/2. Indeed, EPA made perfectly clear that it interprets CAA section 110(k)(5) as not requiring it to tie specific unavoidable breakdown excess emissions with any particular NAAQS exceedance before it may issue a SIP call. *Id.* at 21,643/1. As explained above, this is a reasonable interpretation of the ambiguous statutory language. Therefore, US Magnesium's related assertion that EPA was required to examine monitoring data with respect to the Holly Refining excess emissions event should be rejected for the same reasons. Pet's Br. at 31.[18/]

[18/] As EPA also pointed out, monitors are limited in number and location and it will therefore not always be possible to tie a specific excess emission to an exceedance of the NAAQS as measured at a monitor. 76 Fed. Reg. at 21,646 n.15. Nonetheless, monitors in Utah have recorded exceedances of the $PM_{2.5}$ NAAQS on

(continued...)

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III. EPA Followed Rulemaking Procedures When It Issued the SIP Call.

US Magnesium argues that EPA's final rule is arbitrary and capricious because EPA has treated the 1999 Herman Memorandum as a legislative rule. Pet's Br. at 31-34. This argument is wrong and it ignores the fact that EPA's SIP call was issued through notice-and-comment rulemaking procedures.

Legislative rules, which must be issued through notice-and-comment rulemaking procedures, have the force of law and create new law or impose new rights or duties. *Sorenson Communications v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009). A policy statement "does not establish a 'binding norm' and is not finally determinative of the issues or rights to which it is addressed." *Am. Mining Cong. v. Marshall*, 671 F.2d 1251, 1263 (10th Cir. 1982) (quoting *Pac. Gas & Elec. Co. v. FCC*, 506 F.2d 33, 38 (D.C. Cir. 1974)). Policy statements do not require notice-and-comment rulemaking procedures. *Id.* Similarly, interpretative rules "'advise the public of the agency's construction of the statutes and rules it administers'" and do not require notice-and-comment rulemaking procedures. *Id.* at 1222-23

[18/](...continued)
one-hundred-seventy days during the period 2005 through 2010 and exceedances of the ozone NAAQS on one-hundred-fifty-four days during that time period. *Id.* at n.16. As EPA explained, it is therefore reasonable to conclude that excess emissions during malfunction events have contributed, or have the potential to contribute in the future, to nonattainment of the NAAQS in Utah. *Id.* at 21,646/1.

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(quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)).

The Herman Memorandum constitutes nothing more than a statement of EPA's policy and its interpretation of the CAA with respect to how excess emissions from breakdown events should be treated in SIPs. It is therefore a policy statement and not a legislative rule. *See* JA 141-150 (Herman Memorandum). In fact, in the Schaeffer Memorandum, EPA made clear that the Herman Memorandum is not legally dispositive with respect to any existing SIPs, existing permits, or any particular proceedings in which a violation is alleged to have occurred. JA 131-32 (Schaeffer Memorandum at 1-2). EPA also made clear that it will consider the guidance contained in the Herman Memorandum in the context of future rulemaking actions, such as the SIP approval process. *Id.* at 2. Therefore, the Herman Memorandum is not a legislative rule because it does not have the force of law or create new law or impose new rights or duties.

EPA has acted consistently with the Schaeffer Memorandum by considering the guidance contained in the Herman Memorandum in the context of rulemaking actions. *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1129-30 (upholding EPA's interpretation of the CAA with respect to malfunctions in a challenge to a site-specific FIP for the Four Corners Power Plant); *Michigan Dep't. of Envtl. Quality v. Browner*, 230 F.3d at 183 (upholding EPA's interpretation of the CAA

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with respect to startups, shutdown and malfunctions in a challenge to EPA's disapproval of a Michigan SIP revision). *See also Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1353-1355 (11th Cir. 2006) (holding that Herman Memorandum and Schaeffer Memorandum did not effect any change on the start-up, shut-down and malfunction provision in the approved Georgia SIP but that EPA could require Georgia to revise the SIP to be consistent with the interpretation contained in the memoranda through a SIP call).

Likewise, EPA's SIP call in this case was made through notice-and-comment rulemaking procedures. As EPA explained, it did not treat the Herman Memorandum as binding on Utah or assert that the Memorandum itself somehow changed the Utah SIP. 76 Fed. Reg. at 21,644. Rather, it evaluated the Utah SIP through a notice-and-comment rulemaking action in order to determine whether the SIP is consistent with EPA's interpretation of the CAA as reflected in EPA's various statements over the past 29 years. *Id.* Because this is all that is required for legislative rules under the APA, 5 U.S.C. § 553, US Magnesium's argument should be rejected.

IV. The SIP Call Is Consistent With EPA's Regulations And Policy Statements.

In its final barrage, US Magnesium argues that EPA's SIP call is inconsistent with both the Schaeffer Memorandum and EPA's NSPS regulations.

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It also argues that the Utah breakdown exemption is actually consistent with EPA's interpretation of the CAA as expressed in its policy memoranda on excess emissions from breakdown events. Pet's Br. at 34-42. All of these arguments are off target.

A. The SIP Call Is Consistent With the Schaeffer Memorandum.

US Magnesium asserts that the Schaeffer Memorandum limits EPA's application of the statutory interpretation embodied in the Herman Memorandum solely to future SIP actions. Pet's Br. at 35. This argument is specious.

The Schaeffer Memorandum states that the interpretation set forth in the Herman Memorandum does not alter the status of any existing approved SIP and that "it is in the context of future rulemaking actions *such as* the SIP approval process, that EPA will consider the Guidance and the statutory principles on which the Guidance is based." JA 132 (Schaeffer Memorandum at 2) (emphasis added). As explained above, this language in the Schaeffer Memorandum clarifies that the Herman Memorandum is merely a policy statement and not a legislative rule. Indeed, as the court in *Sierra Club v. Georgia Power Co.*, 443 F.3d at 1353-1355, expressly recognized, the Schaeffer Memorandum made clear that the Herman Memorandum *itself* did not alter the status of any existing SIP and that if EPA wanted a State to change its SIP to be consistent with EPA's interpretation of the

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CAA, then it should call the SIP under CAA section 110(k)(5), exactly the action EPA took here. Thus, the court recognized that the Schaeffer memorandum did not limit the applicability of the Herman Memorandum only to future SIP approvals. Rather, the CAA interpretation expressed in the Herman Memorandum could apply to other actions, including SIP calls. Accordingly, the SIP call in this case is entirely consistent with the Schaeffer Memorandum.

B. EPA Reasonably Determined That the Utah Breakdown Exemption Is Not Consistent With EPA's Interpretation of the CAA as Set Forth in the Herman Memorandum.

US Magnesium asserts that the Utah breakdown exemption is consistent with the Herman Memorandum in some respects and therefore EPA should not have issued the SIP call. Pet's Br. at 36-40. US Magnesium quotes from a portion of three sentences in EPA's fourteen-page final rule and incorrectly asserts that those fragmented quotes constitute the sum total of the inconsistencies EPA found with the Utah breakdown exemption versus EPA's interpretation of the CAA's requirements. Pet's Br. at 36-37. The snippets US Magnesium quotes are taken from EPA's response to a comment asserting that the approach for addressing unavoidable breakdown events set forth in the Herman Memorandum would have no impact in Utah because unavoidable breakdowns will occur regardless of the rules for addressing such events. 76 Fed. Reg. at 21,648. In doing so, US

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Magnesium conveniently overlooks the primary basis for EPA's SIP call, which is that the Utah breakdown exemption completely exempts from any liability, including claims for injunctive relief, excess emissions from qualifying breakdown events. *Id.* at 21,641/2. In addition, US Magnesium's arguments are also incorrect with respect to the three snippets from EPA's response to comments with which US Magnesium takes issue.

US Magnesium first argues that EPA engaged in speculation when it stated that "'the criteria contained in the [Utah Breakdown Rule] are not as extensive or rigorous as the criteria of the 1999 Policy.'" Pet's Br. at 36. However, EPA there explained that how one defines "unavoidable" is important and that unlike the Herman Memorandum, the Utah breakdown exemption does not address potential design flaws in the equation of what is truly "unavoidable." 76 Fed. Reg. at 21,648. EPA also explained that this could hamper Utah or EPA's ability to address design flaws that result in breakdowns because a court might read the rule to provide that breakdowns due to design flaws are unavoidable. *Id.*

From this, US Magnesium concludes that EPA's SIP call is based only upon speculation as to how a court might rule in a hypothetical future case. Pet's Br. at 36. EPA's decision clearly was not solely based on that single issue as the final rule and the arguments above demonstrate. Additionally, it is reasonable for EPA

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to consider how a court might rule in any future enforcement case concerning excess emissions under the Utah breakdown exemption and US Magnesium has not shown to the contrary. Moreover, US Magnesium does not explain how a breakdown provision that exempts excess emissions caused by underlying design flaws is consistent with section 110(a)(2)(A) of the CAA or attainment and maintenance of the NAAQS. US Magnesium's argument should therefore be rejected.

US Magnesium next argues that EPA was incorrect when it stated that "'the UBR does not indicate who has the burden of proof regarding claims of unavoidable breakdowns.'" Pet's Br. at 37. US Magnesium asserts that it is clear under the Utah breakdown exemption that a source has the burden of satisfying Utah that a breakdown event is exempt under the rule and Utah then determines whether a violation has occurred. Pet's Br. at 37. This misses the point. EPA was discussing the burden of proof in a civil enforcement action, not the initial discussions between a source and Utah that might allow Utah to determine whether a violation occurred. 76 Fed. Reg. at 21,648.

Moreover, even if a source bears the burden of proving it is entitled to the Utah breakdown exemption, EPA reasonably interprets the CAA to provide that a State may not provide for complete exemptions to liability for excess emissions

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occurring during unavoidable breakdowns. JA 142, 146 (Herman Memorandum at 2, Attachment to Herman Memorandum at 3). Rather, a source may be provided with an affirmative defense solely as to claims for civil penalties for which it would have the burden of proof in an enforcement action. *Id.* *See also Arizona Pub. Serv. Co. v. EPA*, 562 F.3d at 1130 (upholding affirmative defense provision for malfunctions in site-specific FIP). Contrary to EPA's interpretation of what would be acceptable under the CAA, the Utah breakdown exemption provides an exemption to liability, as opposed to an affirmative defense solely to claims for civil penalties. It clearly provides that "emissions resulting from an unavoidable breakdown will not be deemed a violation of [the Utah air quality] regulations." Utah Admin. Code R307-107-1. Thus, contrary to US Magnesium's assertion, EPA has not used "marginal ambiguity" to call the SIP. Pet's Br. at 37. If anything, the language from the final rule regarding the lack of clarity on who has the burden of proof understates the inconsistency between the Utah breakdown exemption and EPA's interpretation of the CAA. *See* 76 Fed. Reg. at 21,649/1 (noting that a significant difference between the Utah exemption and EPA's interpretation of the CAA is that the Utah exemption would prevent any action for penalties and injunctive relief).

Next, US Magnesium points to EPA's statement that the Utah breakdown

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exemption "'appears to give the Utah Executive Secretary the exclusive authority to determine whether a violation has occurred.'" Pet's Br. at 37. EPA discussed this issue in detail in the final rule. 76 Fed. Reg. at 21,647/3-21,648/1. *See also id.* at 21,641, 21,647/2; 75 Fed. Reg. at 70,892/3. US Magnesium never states whether it agrees or disagrees with the statement. Rather, it asserts only that the statement conflicts with previous statements by EPA. Pet's Br. at 38-40. In particular, US Magnesium cites to a statement made when EPA first approved the Utah breakdown exemption in 1979 that any exemptions granted under the provision are not applicable as a matter of Federal law and that EPA reserves the right to enforce against excess emissions. *Id.* While EPA made those statements at that time, it acknowledged in this rulemaking that it is not clear how EPA previously reached the conclusion that exemptions granted by Utah would not apply as a matter of Federal law or how a court would view the issue. 75 Fed. Reg. at 70,890/3.

In fact, as US Magnesium recognizes, long after EPA had made those statements, a company against whom EPA brought a civil enforcement action specifically argued that Utah's determination that the company's excess emissions were exempt under the Utah breakdown exemption was binding on EPA. Pet's Br. at 39. 76 Fed. Reg. at 21,647/2. EPA argued to the contrary, but the case was

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settled prior to any ruling on the issue. *Id.* Contrary to US Magnesium's argument here, EPA candidly discussed the position it took in that litigation in its final rule in this case. *Id.* EPA specifically concluded that it was uncertain whether EPA or citizens could pursue enforcement actions in cases where Utah has determined that the exemption applies. *Id*. After discussing the issue in detail, EPA reasonably concluded that, due to the ambiguity, the reasonable course is to require Utah to amend the Utah breakdown exemption to remove this potential impediment to EPA's and citizens' ability to enforce emissions limitations under the Utah SIP. *Id.* at 21,648.[19/] Therefore, EPA's determination should be upheld as reasonable under all the circumstances.

C. The SIP Call Is Not Inconsistent with EPA's NSPS Regulations and *Sierra Club. v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), Supports the SIP Call.

US Magnesium asserts that the Utah breakdown exemption is similar to EPA's NSPS regulations, which do not consider excess emissions during malfunction periods to be violations. Pet's Br. at 40-42. However, under CAA

[19/] One commenter suggested that the potential preclusive effect of Utah's determination that excess emissions are exempt is consistent with the States' roles with respect to SIP matters. *Id.* at 21,648/2. While EPA disagreed, the fact that some believe EPA is and should be precluded from taking an enforcement action when Utah determines the exemption applies demonstrates the reasonableness of EPA's determination.

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section 111, the NSPS are *technology-based* standards that apply to stationary sources that are constructed, modified, or reconstructed after the standard is proposed. 42 U.S.C. § 7411(a)(2). Regardless of whether exemptions are appropriate for technology-based standards, as discussed above, EPA has reasonably determined that exemptions should not be allowed for exceedances of SIP-based emissions limitations, which, unlike NSPS, are health-based.[20/] As also discussed above, consistent with its long-held interpretation as set forth in the Herman Memorandum, EPA also reasonably determined that to the extent any exemption is warranted from the technology-based NSPS, its regulations provide the appropriate exemption and the Utah breakdown exemption should not separately apply to the NSPS. 76 Fed. Reg. at 21,641; JA 147 (Herman Memorandum, attachment at 3 & n.6). Therefore, US Magnesium's argument with respect to the NSPS should be rejected.

Sierra Club. v. EPA, 551 F.3d 1019, concerned a general start-up shutdown and malfunction provision applicable to some of EPA's technology-based MACT

[20/] In light of *Sierra Club. v. EPA*, 551 F.3d 1019, which vacated a malfunction exemption provision for certain technology-based NESHAPS, EPA no longer believes malfunction exemptions are appropriate for the NSPS. EPA has recently proposed to amend two NSPS consistent with this view, and it intends to so address other NSPS in the future. *See* 76 Fed. Reg. 52,738, 52,766 (Aug. 23, 2011); 76 Fed. Reg. 63,878, 63,883-884 (Oct. 14, 2011).

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standards for hazardous air pollutants under CAA section 112. *See* Pet's Br. at 41. EPA's regulations provided that exceedances of the relevant MACT standards during periods of start-up, shutdown and malfunction were not considered violations, but required sources to comply with the "general duty" to maintain and operate the affected facility, including its pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions. 551 F.3d at 1022. The court read CAA section 112 and CAA section 302(k) (defining the term "emissions standard") together to require that EPA's MACT standards must require continuous compliance with some section 112-compliant standard, and that the "general duty" was not a section 112-compliant standard. *Id.* at 1027-28. EPA's SIP call is consistent with this case, because EPA's underlying interpretation of the CAA is based in part on its reading of CAA section 302(k) to require continuous SIP-based emissions limitations. 75 Fed. Reg. at 70,892/1-2; 76 Fed. Reg. at 21,641, 21,644/2.

US Magnesium argues that the Utah breakdown exemption does not excuse compliance with the underlying emissions standards and asserts that the rule contains stricter requirements than the "general duty" requirement in EPA's MACT standards. Pet's Br. at 41. However, as explained above, the Utah breakdown exemption provides that "emissions resulting from an unavoidable

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breakdown will not be deemed a violation of [the Utah air quality] regulations." Utah Admin. Code R307-107-1. Thus, it clearly exempts the source from compliance with the underlying emissions limitations during breakdown events and is inconsistent with the CAA's definition of "emission limitation" as applying on a continuous basis. *See* 42 U.S.C. § 7602(k).[21/] The fact that sources must take "all reasonable measures" to comply with the underlying limits does not render the provision any less of an exemption to liability when it is deemed to apply. *See* Utah Admin. Code R307-107-4. Therefore, the fact that it may be stricter than the general duty clause is irrelevant.

Finally, EPA's letter to certain industry counsel regarding the impact of the court's decision in *Sierra Club. v. EPA*, 551 F.3d 1019, on the full suite of EPA's MACT standards has no bearing here. Pet's Br. at 42. EPA there indicated that only certain MACT standards were directly subject to the decision and that it intended to evaluate the others in light of the opinion. JA 190-92 (Letter from

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[21/] Moreover, US Magnesium's assertion that the exemption does not excuse compliance with the underlying emissions standards is belied by its standing argument. US Magnesium there asserts that it "has relied upon the UBR to provide it protection from an enforcement action" when its facility experienced excess emissions beyond its permitted emissions limitation during a breakdown event. Pet's Br. at 17.

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Adam M. Kushner to Charles H. Knauss, *et al.* (July 22, 2009) at 1-3).[22/] The letter does not mean that the court's reasoning in *Sierra Club. v. EPA*, 551 F.3d 1019, regarding the CAA section 302(k) definition of "emissions limitation" is inapplicable to the Utah breakdown exemption. As discussed above, that decision supports EPA's SIP call in this case.

CONCLUSION

For all these reasons, the Petition for Review should be denied.

Respectfully submitted,

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[22/] EPA has since more formally addressed the impact of the opinion on certain NESHAPS. *See, e.g.*, 76 Fed. Reg. 70,834 (Nov. 15, 2011); 76 Fed. Reg. 22,566 (Apr. 21, 2011); 76 Fed. Reg. 15,608 (Mar. 21, 2011).

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Date: January 27, 2012

STATEMENT REGARDING ORAL ARGUMENT

EPA believes that oral argument will assist the Court in its resolution of the issues raised in this case. EPA therefore requests that oral argument be scheduled.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 13,955 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the glossary of acronyms.

s/ David A. Carson

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CERTIFICATION OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User's Manual it is hereby certified that: (1) no privacy redactions were required for this document, (2) the electronic version of this document is an exact copy of the written document that is filed with the Clerk and vice-versa, (3) the digital copy of this document has been scanned for viruses with the most recent version of Microsoft Forefront Client Security, which was last updated on January 25, 2012, and, according to the program, is free of viruses.

s/David A. Carson

CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 27th[st] day of January, 2012. Any other counsel of record will be served by first class U.S. mail on this same day.

s/ David A. Carson

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ADDENDUM

75 Fed. Reg. 70,888 (Nov. 19, 2010)

76 Fed. Reg. 21,639 (Apr. 18, 2011)

5 U.S.C. § 706(2)(A)

42 U.S.C. § 7410

42 U.S.C. § 7411(a)(1)

42 U.S.C. § 7411(a)(2)

42 U.S.C. § 7412(c)

42 U.S.C. § 7412(d)

42 U.S.C. § 7413

42 U.S.C. §§ 7470-7492

42 U.S.C. § 7602(k)

42 U.S.C. § 7604(a)(1)

42 U.S.C. § 7604(a)(3)

42 U.S.C. § 7607(b)(1)

Utah Admin Code R307-107-1 to 107-6

Electronic mail message from Dave McNeill, Utah Division of Air Quality to Monica S. Morales, Unit Chief, Air Quality Planning Unit, EPA Region 8 (June 15, 2011), transmitting a message from Bryce C. Bird, Director, Utah Division of Air Quality.

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(4) The futures commission merchant, swap dealer, or major swap participant shall promptly furnish an amended annual report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (e)(3) of this section.

(5) A futures commission merchant, swap dealer, or major swap participant may request from the Commission an extension of time to furnish its annual report, provided the registrant's failure to timely furnish the report could not be eliminated by the registrant without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(6) A futures commission merchant, swap dealer, or major swap participant may incorporate by reference sections of an annual report that has been furnished within the current or immediately preceding reporting period to the Commission. If the futures commission merchant, swap dealer, or major swap participant is registered in more than one capacity with the Commission, and must submit more than one annual report, an annual report submitted as one registrant may incorporate by reference sections in the annual report furnished within the current or immediately preceding reporting period as the other registrant.

(f) *Recordkeeping.*

(1) The futures commission merchant, swap dealer, or major swap participant shall maintain:

(i) A copy of the compliance policies, as defined in § 3.1(g), and all other policies and procedures adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of materials, including written reports provided to the board of directors or the senior officer in connection with the review of the annual report under paragraph (d) of this section; and

(iii) Any records relevant to the annual report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are created, sent or received in connection with the annual report and contain conclusions, opinions, analyses, or financial data related to the annual report.

(2) All records or reports that a futures commission merchant, swap dealer, or major swap participant are required to maintain pursuant to this section shall be maintained in accordance with § 1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of the applicable prudential regulator, as defined in 1a(39) of the Act.

Issued in Washington, DC, on November 10, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Statement of Chairman Gary Gensler

Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant

I support the proposed rulemaking establishing requirements for the designation, qualifications and duties of a chief compliance officer of swap dealers, major swap participants and futures commission merchants. These rules are intended to ensure that sufficient resources are devoted to compliance with laws and regulations, which is a core component of sound risk management practices. The proposed rules fulfill the Dodd-Frank Act's requirements that intermediaries have chief compliance officers and establish and administer compliance policies, as well as resolve certain conflicts of interest.

[FR Doc. 2010–29021 Filed 11–18–10; 8:45 am]

BILLING CODE 6351–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2010–0909; FRL–9228–9]

Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the Clean Air Act, EPA is proposing to find that the Utah State Implementation Plan (SIP) is substantially inadequate to attain or maintain the national ambient air quality standards or to otherwise comply with the requirements of the Clean Air Act. Specifically, the SIP includes Utah rule R307–107, which exempts emissions during unavoidable breakdowns from compliance with emission limitations. This rule undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on to ensure attainment or maintenance of the national ambient air quality standards or meet other Clean Air Act requirements. If EPA finalizes this proposed finding of substantial inadequacy, Utah will be required to revise its SIP to correct this deficiency within 12 months of the effective date of our final rule. If EPA finds that Utah has failed to submit a complete SIP revision as required by a final rule or if EPA disapproves such a revision, such finding or disapproval would trigger clocks for mandatory sanctions and an obligation for EPA to impose a Federal Implementation Plan. EPA is also proposing that if EPA makes such a finding or disapproval, sanctions would apply consistent with 40 CFR 52.31, such that the offset sanction would apply 18 months after such finding or disapproval and highway funding restrictions would apply six months later unless EPA first takes action to stay the imposition of the sanctions or to stop the sanctions clock based on the State curing the SIP deficiencies. EPA is also requesting comment on whether EPA should exercise its discretionary authority under the Clean Air Act to impose highway funding restrictions in all areas of the State, not just in nonattainment areas.

DATES: Comments must be received on or before December 20, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2010–0909, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: russ.tim@epa.gov.*
- *Mail:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Fax:* (303) 312–6064 (please alert the individual listed in **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Hand Delivery:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2010–0909. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise

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protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6479, or *russ.tim@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, the following definitions apply:

(i) The word *Act* or initials *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *NAAQS* mean national ambient air quality standard.

(iv) The initials *SIP* mean or refer to State Implementation Plan.

(v) The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.

Table of Contents

I. General Information

What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background

On September 20, 1999, Assistant Administrator for Enforcement and Compliance Assurance, Steven A. Herman, and Assistant Administrator for Air and Radiation, Robert Perciasepe, issued the EPA's most recent policy on appropriate State Implementation Plan (SIP) provisions addressing excess emissions during periods of startup, shutdown and malfunction (SSM). "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown" (1999 Policy). The 1999 Policy indicated that it was expanding on and clarifying two previous policies issued in 1982 and 1983 by then Assistant Administrator for Air, Noise and Radiation Kathleen Bennett ("1982 Policy" and "1983 Policy").

In the 1982 and 1983 Policies, Assistant Administrator Bennett enunciated the Agency's position that SIPs should not be approved if they include exemptions for excess emissions during malfunction events.[1] These policies reflect the Agency's interpretation that broad exemptions from compliance with emission limitations during periods of malfunction prevent a SIP from adequately ensuring attainment and maintenance of national ambient air quality standards (NAAQS). For purposes of demonstrating attainment and maintenance, states rely on assumed compliance with emission limitations. *See, e.g.,* Clean Air Act (CAA) sections 110(a)(2)(A) and (C); 40 CFR 51.112; *Train* v. *NRDC,* 421 U.S.

[1] As indicated above, the 1982, 1983, and 1999 Policies also address excess emissions provisions for startup and shutdown events. However, because our proposed action only addresses a malfunction provision—Utah's unavoidable breakdown rule—we are not including any further discussion of the Policies as they relate to startup and shutdown.

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60, 78–79 (1975). Thus, the 1982 and 1983 Policies indicated that, because SIPs must provide for attainment and maintenance of the NAAQS, any SIP provisions addressing malfunctions must be narrowly drawn and should not provide a blanket exemption from compliance with emission limitations; all periods during which emissions exceed emission limitations ("excess emissions") should constitute violations under the SIP.

The 1982 and 1983 Policies stated that EPA could approve SIP revisions that incorporated an enforcement discretion approach as described in the Policies. This enforcement discretion approach envisioned commencement of a proceeding to notify the source of its violation and a demonstration by the source that the excess emissions, "though constituting a violation," were due to an unavoidable malfunction. Following the proceeding and consideration of specific criteria, the state agency would decide whether to pursue an enforcement action. The 1982 and 1983 Policies also advised that the state could choose not to include in the SIP any provision on malfunctions, which reflected the fact that the CAA does not require states to include in SIPs any form of relief for violations caused by malfunctions.

EPA understood that some malfunctions are unavoidable: "Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate." (1982 and 1983 Policies). However, EPA was also mindful of its duty under the CAA to protect the NAAQS:

"The rationale for establishing these emissions as violations, as opposed to granting automatic exemptions, is that SIPs are ambient-based standards and any emissions above the allowable may cause or contribute to violations of the national ambient air quality standards. Without clear definitions and limitations, these automatic exemption provisions could effectively shield excess emissions arising from poor operation and maintenance or design, thus precluding attainment. Additionally, by establishing an enforcement discretion approach and by requiring the source to demonstrate the existence of an unavoidable malfunction on the source, good maintenance procedures are indirectly encouraged." (1982 Policy.) [2]

The 1999 Policy reiterated EPA's interpretation that all periods of excess emissions should be considered violations. However, the 1999 Policy reflected our interpretation that a state could include a narrowly crafted affirmative defense provision in the SIP as an alternative to an enforcement discretion provision. Under this approach, a SIP could provide an affirmative defense to an enforcement action for penalties, but not to an action for injunctive relief. The Agency explained that because periods of excess emissions could undermine attainment and maintenance of the NAAQS and protection of prevention of significant deterioration (PSD) increments, an affirmative defense to an action for injunctive relief would not be appropriate.[3]

We also indicated in the 1999 Policy that we would not approve a rule that would bar EPA or citizen enforcement based on a state's decision to exercise its discretion not to pursue an enforcement action. EPA explained that such a rule would be inconsistent with the regulatory scheme established in Title I of the CAA.

Finally, the 1999 Policy noted that some SIPs had been approved that appeared to be in conflict with EPA's SSM policies. The Policy indicated that EPA Regional Offices should work with the states to ensure SIPs were consistent with EPA's interpretation of the Act's requirements.

Since the 1999 Policy was issued, EPA Region VIII has worked with states within the Region to ensure that their SIPs are consistent with EPA's interpretation of the Act as set forth in the 1982, 1983, and 1999 Policies.[4] Shortly after the 1999 Policy was issued, we advised Utah that its unavoidable breakdown rule was inconsistent with the CAA, and since that time, we have asked Utah several times to revise the rule. Among other things, the rule provides that "emissions resulting from an unavoidable breakdown will not be deemed a violation * * *"

Some version of the Utah unavoidable breakdown rule has been in the SIP for many years. In 1980, EPA approved a variation of the current Utah unavoidable breakdown rule. In the proposed rulemaking preamble, EPA stated that it could "not fully approve Regulation 4.7 because it exempts certain excess emissions from being violations of the Air Conservation Regulations," but then proposed to approve Utah's malfunction procedures because any exemptions granted by the Utah Executive Secretary "are not applicable as a matter of federal law." 44 FR 28688, 28691 (May 16, 1979). EPA's final approval of the regulation mirrored this concept. 45 FR 10761, 10763 (February 19, 1980). However, thirty years later, it is not clear how EPA reached the conclusion that exemptions granted by Utah would not apply as a matter of federal law or whether a court would honor EPA's interpretation; the Utah rule itself makes no reference to a reservation of federal authority. Instead, the rule merely states that information submitted by a source regarding a breakdown event would be "used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action."

EPA approved a revised version of the rule in 1994 with no preamble discussion, except to say that the Utah air rules had been renumbered and new requirements had been added (59 FR 35036, July 8, 1994; 40 CFR 52.2320(c)(25)(i)(A)). The key aspects of the unavoidable breakdown rule remained the same.

Subsequently, Utah again re-numbered its entire SIP regulations, and EPA approved the re-numbered regulations, including the re-numbered unavoidable breakdown rule, to conform the federally-approved SIP to the numbering of Utah's regulations. (70 FR 59681 (October 13, 2005).) EPA did not consider the substance of the unavoidable breakdown rule in that action. Instead, EPA indicated that it was only approving the renumbering and that attempts to address problems in the rules were ongoing:

"By this action, EPA has reviewed the Utah Department of Air Quality's (UDAQ) SIP submittals and found that these SIP submittals only renumber and restructure UDAQ's rules. EPA has not reviewed the substance of these rules as part of this action; EPA approved these state rules into the SIP in previous rulemakings. The EPA is now merely approving the renumbering system submitted by the State. The current version of UDAQ's rules does not contain substantive changes from the prior codification that we

[2] Even prior to the issuance of the 1982 and 1983 Policies, it was our interpretation that all excess emissions, regardless of cause, should be treated as violations so as to provide sources with the incentive to properly design their facilities in the first instance and to improve their operation and maintenance practices over time. See, e.g., 42 FR 58171 (November 8, 1977).

[3] In a 2009 decision, the United States Court of Appeals for the Tenth Circuit held that the policy was a "reasonable interpretation of the Clean Air Act." *Arizona Public Service Company* v. *EPA,* 562 F.3d 1116, 1129 (10th Cir. 2009). *See also Michigan Dept. of Environmental Quality* v. *EPA,* 230 F.3d 181 (6th Cir. 2000).

[4] For example, at our request, the State of Colorado revised its SIP provisions for SSM. We approved revised provisions in 2006 (71 FR 8958, February 22, 2006) and 2008 (73 FR 45879, August 7, 2008). At our request, the State of Wyoming revised its SIP provision for malfunctions. We approved the revised provision on April 16, 2010 (75 FR 19886). At our request, the State of North Dakota revised its SIP provision for malfunctions and submitted the revised provision to us on April 6, 2009. That provision is modeled on the Wyoming provision, and we intend to propose action on it shortly.

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approved into the SIP. EPA acknowledges that there are ongoing discussions with Utah to address EPA's concerns with some rule language that EPA previously approved into the Utah SIP. In an April 18, 2002 letter from Richard Sprott, Director of Utah's Division of Air Quality, to Richard Long, Director of the Air and Radiation Program in EPA Region 8, UDAQ committed to work with us to address our concerns with the Utah SIP. Because the SIP submittals only restructure and renumber the existing SIP-approved regulations, contain no substantive changes, and UDAQ has committed to address EPA's concerns, we believe it is appropriate to propose to approve the submittal. Approving the restructured and renumbered Utah rules into the SIP will also facilitate future discussions on the rules. EPA will continue to require the State to correct any rule deficiencies despite EPA's approval of this recodification." (70 FR at 59683)

Over the years Utah personnel acknowledged that the unavoidable breakdown rule should be revised and committed to do so. For example, in a January 17, 2001 letter to EPA, Rick Sprott, then the Executive Director of the Utah Division of Air Quality (UDAQ), wrote the following:

"With respect to EPA's concern with the breakdown rule currently approved into Utah's SIP, UDAQ agrees that the rule would benefit from clarification."

Later, in an April 18, 2002 letter,[5] Mr. Sprott wrote the following:

"The Utah Division of Air Quality commits to work with EPA in good faith to develop approvable SIP revisions, which address the following issues:

* * *

8. Unavoidable breakdown rules and consistency with the EPA September 20, 1999 policy regarding such breakdowns."

In 2004, UDAQ staff drafted replacement rule language for the breakdown rule, consulted with EPA and other stakeholders, and initiated the State's public process for SIP revisions. EPA provided detailed comments regarding draft rule language and in January 2005 traveled to Utah to provide a detailed presentation to UDAQ and industry stakeholders regarding EPA's interpretations of the CAA and concerns regarding UDAQ's proposed replacement rule language.

Following the January 2005 meeting, Fred Nelson of the Utah Attorney General's Office prepared another draft of possible replacement rule language, which he shared with EPA and industry representatives. In May 2005, in an attempt to ensure that any rule revision could ultimately be approved by EPA, EPA provided specific comments and suggestions to Mr. Nelson regarding this draft. However, UDAQ did not pursue further rulemaking action at that time.

During the August 2, 2006 midyear review between UDAQ and EPA, the unavoidable breakdown rule was again discussed. Mr. Sprott indicated that he did not want to pursue further action on the unavoidable breakdown rule given the disagreement between Utah industry and EPA. However, he said he was aware that Colorado was in the process of revising its malfunction rule, that he would be happy to benefit from the Colorado process, and that if it concluded successfully, he would lead the effort to adopt a new rule in Utah. Mr. Sprott also said that while he wanted to complete a rule revision through a cooperative process, if it couldn't be done that way, EPA should do a SIP call. Although Colorado subsequently adopted a revised malfunction rule and we approved it into the SIP without challenge (73 FR 45879, August 7, 2008), we are unaware of any further steps taken by Utah to revise its unavoidable breakdown rule.

To assure that a state's SIP provides for attainment and maintenance of the NAAQS, and compliance with other CAA requirements, sections 110(a)(2)(H) and 110(k)(5) of the CAA authorize EPA to find that a SIP is substantially inadequate to attain or maintain a NAAQS, or comply with other CAA requirements, and to require ("call for") the state to submit, within a specified time period, a SIP revision to correct the inadequacy. This CAA requirement for a SIP revision is known as a "SIP call." The CAA authorizes EPA to allow a state up to 18 months to respond to a SIP call.

On September 3, 2009, WildEarth Guardians (WEG) filed a complaint against EPA in the U.S. District Court for the District of Colorado (Civil Action No. 09–cv–02109–MSK–KLM) seeking, among other things, an injunction requiring EPA to issue a SIP call to Utah to revise the unavoidable breakdown rule. On November 23, 2009, we entered into a Consent Decree with WEG that requires us to sign a notice of final rulemaking action by February 28, 2011. In that final rulemaking action we must determine whether the Utah breakdown provision (Utah Regulations 307–107–1 through 307–107–5) renders the Utah SIP "substantially inadequate" within the meaning of section 110(k)(5) of the CAA, 42 U.S.C. 7410(k)(5), and, if EPA determines that the SIP is substantially inadequate, require the State to revise the SIP as it relates to the Utah breakdown provision. We intend to meet the requirements of the Consent Decree through the rulemaking action we are initiating today.

III. Why is EPA proposing a SIP call?

Utah rule R307–107 contains various provisions that are inconsistent with EPA's interpretations regarding the appropriate treatment of malfunction events in SIPs and which render the Utah SIP substantially inadequate. As a result, we are calling for a SIP revision.

A. Deficiencies in R307–107–1

R307–107–1 indicates it applies to all regulated pollutants including those for which there are NAAQS and states that "emissions resulting from unavoidable breakdown will not be deemed a violation of these regulations." As described above, our interpretation of the CAA as expressed in our various policy statements since the early 1980s is that SIP provisions may not provide that periods of excess emissions are not violations.

We believe the Utah rule's broad exemption undermines the ability to protect the NAAQS, PSD increments, and visibility through enforcement of emission limits contained in the SIP. The Utah SIP contains generic emission limits that help areas maintain the NAAQS as well as emission limits specifically modeled and relied on to bring areas not attaining the NAAQS into attainment. *See, e.g.,* Utah rule R307–201 ("General Emission Standards") and Section IX.H.1 of the Utah SIP (contains emission limits for the Utah County PM10 nonattainment area SIP). Because the NAAQS are not directly enforceable against individual sources,[6] SIPs rely on the adoption and enforcement of these generic and specific emission limits to attain and maintain the NAAQS, as well as to protect PSD increments and meet other CAA requirements, such as protection of visibility in Class I areas.

In the case of an unavoidable breakdown, the rule's exemption eliminates any opportunity to obtain injunctive relief that may be needed to protect the NAAQS, increments, and visibility. Thus, the rule impedes the ability to protect public health and the environment. Furthermore, the rule's exemption reduces a source's incentive to design, operate, and maintain its facility to meet emission limits at all times.

We expect some commenters may assert that we need to show a direct causal link between unavoidable breakdown excess emissions and specific threats to or violations of the

[5] April 18, 2002 letter from Rick Sprott, UDAQ to Richard Long, EPA referred to as 15-point commitment letter.

[6] *See, e.g., Coalition Against Columbus Ctr.* v. *New York,* 967 F.2d 764, 769 (2d Cir. 1992); *League to Save Lake Tahoe, Inc.* v. *Trounday, 598* F.2d 1164, 1173 (9th Cir. 1979); 57 FR 32276, July 21, 1992.

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NAAQS to conclude that the SIP is substantially inadequate. We do not agree. It is our interpretation that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limits relied on to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse. We do not believe we are restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a violation can be directly linked to specific excess emissions. It is sufficient that emissions limits to which the unavoidable breakdown exemption applies have been, are being, and will be relied on to attain and maintain the NAAQS and meet other CAA requirements.[7]

Our interpretation of the CAA is supported by sections 110 and 302 of the CAA. Section 110(a)(2)(A) requires each SIP to include enforceable emission limitations necessary or appropriate to meet the CAA's applicable requirements. As noted above, these applicable requirements include attainment and maintenance of the NAAQS, prevention of significant deterioration, and improvement and protection of visibility in national parks and wilderness areas. Section 302(k) defines emission limitation as a requirement established by a state or EPA that "limits the quantity, rate, or concentration of emissions of air pollutants **on a continuous basis**." (Emphasis added.) Because of the exemption in R307–107–1, emission limits in the Utah SIP that have been relied on by the State to demonstrate attainment and maintenance of the NAAQS and meet other CAA requirements do not limit emissions on a continuous basis and are not fully enforceable.

R307–107–1 is also substantially inadequate because it applies to all regulated pollutants, not just NAAQS pollutants, and because it indicates that excess emissions from an unavoidable breakdown are not deemed a violation of "these regulations." "These regulations" includes the totality of Utah's air pollution control regulations, which include the regulations Utah has incorporated by reference to receive delegation of federal authority—for example, New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS). *See* Utah rules R307–210 and R307–214. To the extent any exemptions with respect to malfunctions from these technology-based standards are warranted, the federal standards contained in EPA's regulations already specify the appropriate exemptions. *See, e.g.,* 40 CFR 60.48Da(c). No additional exemptions are warranted or appropriate. *See, e.g.,* 40 CFR 60.10(a); 40 CFR 63.12(a)(1); and the 1999 Policy, Attachment, page 3. Thus, R307–107–1 is substantially inadequate because it improperly provides an exemption not contained in and not sanctioned by the delegated federal standards.

Our interpretation, as it applies to both technology-based standards and SIP limits, is further supported by a 2008 U.S. Court of Appeals decision that vacated EPA's general malfunction exemption from CAA section 112(d) maximum achievable control technology (MACT) standards. *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), *cert. denied.* The court vacated the exemption because it was inconsistent with the CAA's requirement that emission standards—such as the 112(d) MACT standards—must apply continuously, as expressed in section 302(k) of the CAA. The court specifically held that a regulatory provision establishing a general duty to minimize hazardous air pollutant (HAP) emissions during malfunctions was not an emission standard under CAA section 112. Although the decision addressed the HAP program and not the SIP program, it carries significant weight for the SIP program as well because section 302(k) is equally relevant for the SIP program. R307–107–1's broad malfunction exemption from "these regulations" is inconsistent with section 302(k) as interpreted by the Court in *Sierra Club.*

As referenced in R307–107–1, "these regulations" would also include Utah's PSD and nonattainment major new source review (NSR) requirements. This means a source could use the provisions of R307–107 to claim an exemption from best available control technology (BACT) or lowest achievable emission rate (LAER) limits in a major source permit for excess emissions resulting from an unavoidable breakdown. We have consistently interpreted the Act to not allow for outright exemptions from BACT limits, and the same logic applies to LAER limits. *See, e.g.,* 1977 memorandum entitled "Contingency Plan for FGD Systems During Downtime as a Function of PSD," from Edward E. Reich to G.T. Helms and January 28, 1993 memorandum entitled "Automatic or Blanket Exemptions for Excess Emissions During Startup and Shutdowns under PSD," from John B. Rasnic to Linda M. Murphy. As noted, in order to ensure non-degradation of air quality at all times under the PSD program and protection of the NAAQS at all times, it is necessary for a source to comply with its permit limits at all times. This is another reason R307–107's exemption renders the Utah SIP substantially inadequate.

B. Deficiencies in R307–107–2

R307–107–2 requires the source to submit information regarding an unavoidable breakdown to the executive secretary of Utah's Air Quality Board (UAQB) and indicates that the information "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." In other words, the executive secretary shall determine whether the excess emissions were caused by an unavoidable breakdown and, thus, whether the excess emissions constitute a violation or not. This rule provision appears to give the executive secretary exclusive authority to determine whether excess emissions constitute a violation.[8] We believe this is inconsistent with the enforcement structure contemplated by the CAA. Specifically, the CAA provides authority to enforce violations of SIP and other CAA emission limits to EPA and citizens as well as to the states. Thus, the CAA provides EPA and citizens with authority to pursue a violation even if a state chooses not to. See sections 113 and 304 of the CAA. It is our interpretation, expressed in our 1999 Policy, that SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent

[7] The U.S. Court of Appeals for the Eleventh Circuit has recognized that a SIP call under CAA section 110(k)(5) is the appropriate mechanism for EPA to require a change to an existing SSM provision in a SIP: "EPA policy guidance cannot trump the SSM Rule adopted by Georgia and approved formally by the EPA * * * If the EPA believes that its current interpretation of the Clean Air Act requires Georgia to modify its SSM Rule, the EPA should require the state to revise its SIP to conform to EPA policy" (citing CAA section 110(k)(5)).

[8] As we noted earlier, in a 1980 approval of a predecessor to the current unavoidable breakdown rule, EPA indicated that EPA might not approve exemptions granted by the State and that the State's exemption would not apply as a matter of federal law. Thirty years later, we are not sanguine that a court would uphold our interpretation, or that five years from now, anyone will remember that interpretation. *See, e.g., U.S.* v. *Ford Motor Co.,* 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S.* v *General Motors Corp.,* 702 F.Supp. 133 (N.D. Texas 1988) (EPA could not pursue enforcement of SIP emission limits where states had approved alternative limits under procedures EPA had approved into the SIP.) While we do not agree with the holdings of these cases, we think the reasonable course is to eliminate any uncertainty about reserved enforcement authority by requiring the State to revise or remove the unavoidable breakdown rule from the SIP.

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with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action. Because a court could interpret section R307–107–2 as undermining the ability of EPA and citizens to independently exercise enforcement discretion granted by the CAA, it is substantially inadequate to comply with CAA requirements related to enforcement. Because it undermines the envisioned enforcement structure, attainment and maintenance of the NAAQS and compliance with other CAA requirements related to PSD, visibility, NSPS, and NESHAPS is less certain. Potential EPA and citizen enforcement provides an important safeguard in the event a state lacks resources or appropriate intention to enforce CAA violations. Thus, R307–107–2 renders the SIP substantially inadequate to attain or maintain the NAAQS or otherwise comply with the CAA.

C. Conclusion

For the reasons stated above, EPA is proposing to find, pursuant to sections 110(a)(2)(H) and 110(k)(5) of the CAA, that the Utah SIP is substantially inadequate to attain or maintain the NAAQS or to otherwise comply with the requirements of the CAA. Utah rule R307–107 improperly undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on in the SIP to ensure attainment and maintenance of the NAAQS or meet other CAA requirements. Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the CAA, we are proposing to call for Utah to remove R307–107 from the SIP or revise it to be consistent with CAA requirements.

We are proposing that Utah must respond to our SIP call within 12 months of the effective date of a final rule issuing a SIP call. We think this is a reasonable amount of time for several reasons. First, Utah has been aware of our concerns for years. Utah previously initiated the State rulemaking process to address the SIP deficiencies but dropped its efforts when it couldn't achieve consensus. Second, industry and WildEarth Guardians' predecessor had extensive involvement in the development of the Colorado malfunction rule, which, as noted above, we approved in 2008. The Colorado malfunction rule is readily available online, and use of the Colorado rule as a template would give the UAQB a substantial head start in addressing the SIP deficiencies. Other examples of provisions that have been approved or promulgated by EPA for areas within the Region are also available. *See, e.g., https://yosemite.epa.gov/R8/R8Sips.nsf/641057911f6bd13987256b5f0054f380/722dcc2462e7856a87256ef3005f6d4f/$FILE/Ch%201%20Sect%205.pdf* (Wyoming air rules, Chapter 1, Section 5, approved at 75 FR 19886, April 16, 2010); 73 FR 21418, 21464, April 21, 2008. Third, another option to address the deficiencies is to simply remove R307–107 from the SIP. Under this option, no time would be needed to develop replacement SIP rule language.

IV. What happens if EPA issues a final SIP call and the State of Utah does not submit a complete SIP revision that responds to the SIP call or if EPA disapproves a SIP revision that responds to the SIP call?

If Utah fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for EPA to issue a finding of State failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks and a 24-month clock for promulgation of a federal implementation plan (FIP) by EPA. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, section 179 leaves it up to the Administrator to decide the order in which these sanctions apply. EPA issued an order of sanctions rule in 1994 (59 FR 39832, August 4, 1994, codified at 40 CFR 52.31) but did not specify the order of sanctions where a state fails to submit or submits a deficient SIP in response to a SIP call. However, the order of sanctions specified in that rule (40 CFR 52.31) should apply here for the same reasons discussed in the preamble to that rule. Thus, if EPA issues a final SIP call and Utah fails to submit the required SIP revision, or submits a revision that EPA determines is incomplete or that EPA disapproves, EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the State corrects the deficiency before that date. EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the State corrects the deficiency before that date. EPA is also proposing that the provisions in 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply.

Mandatory sanctions under section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment.[9] Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, EPA interprets the section 179 sanctions to apply only in the area or areas of the State that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. In this case, mandatory sanctions would apply in all areas designated nonattainment for a NAAQS within the State because Utah rule R307–107 applies statewide and applies for all NAAQS pollutants.

EPA has additional authority to impose discretionary sanctions under CAA section 110(m). EPA's authority to impose sanctions under section 110(m) is triggered by the same findings that trigger the mandatory imposition of sanctions. However, under section 110(m), EPA may impose sanctions more quickly than provided under the mandatory sanction provision and may also impose them in a broader area. Specifically, under section 110(m), EPA may impose sanctions "any time" after it has made a finding of deficiency or disapproved a SIP. In addition, EPA may impose the sanctions with respect to "any portion of the State the Administrator determines reasonable and appropriate." Finally, although imposition of the 2-to-1 offset sanction is still limited by its terms to areas with part D NSR programs, the highway funding restrictions can be applied in areas designated as attainment or unclassifiable as well as those designated nonattainment. *See* 59 FR 1476 (January 11, 1994); 40 CFR 52.30(d)(2). EPA may determine whether or not to use this authority in response to a SIP failure, and, thus, they are termed discretionary sanctions.

Because only limited portions of the State are designated nonattainment, the mandatory sanctions would not be applicable in all areas of the State that are covered by the rule we have proposed is deficient. EPA is requesting comment on whether to exercise its discretionary authority to impose the highway funding restrictions sanction in all areas of the State, regardless of

[9] An exception to this, not relevant here, is areas located in the Ozone Transport Region, which are required to have a part D NSR program regardless of the area's designation. See CAA section 184(b)(2).

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designation, if it finalizes this proposed SIP call and the State fails to submit a complete SIP revision or EPA disapproves such revision. If EPA were to impose discretionary sanctions, EPA proposes that the same 24-month clock would apply to the highway funding sanction as would apply under the mandatory sanctions.

In addition to sanctions, if EPA finalizes this SIP call and then finds that the State failed to submit a complete SIP revision that responds to the SIP call or disapproves such revision, the requirement under section 110(c) would be triggered that EPA promulgate a FIP no later than two years from the date of the finding or the disapproval if the deficiency has not been corrected.

V. Proposed Action

EPA is proposing that the Utah SIP is substantially inadequate to attain or maintain the NAAQS or to otherwise comply with requirements of the CAA due to significant deficiencies created by Utah's unavoidable breakdown rule, R307–107. Pursuant to CAA sections 110(a)(2)(H) and 110(k)(5), EPA is proposing to require that Utah revise the SIP to correct the inadequacies and submit the revised SIP to EPA within 12 months of the effective date of a final rule finding the SIP substantially inadequate. EPA is proposing that mandatory sanctions under CAA section 179 would apply as provided in 40 CFR 50.31 should Utah not submit a complete SIP consistent with a final SIP call requirement or should EPA disapprove any such submission. EPA is also requesting comment on whether EPA should exercise its discretionary authority under section 110(m) to impose highway funding restrictions in all areas of the State if 24 months after a sanctions clock has been triggered, the State has still not corrected the deficiency that triggered the sanctions clock.

We are soliciting comments on these proposed actions. Final rulemaking will occur after consideration of any comments.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

This proposed action would only require the State of Utah to revise UAC R307–107 to address requirements of the CAA. Accordingly, the Administrator certifies that this proposed action would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because this proposed action would not impose any requirements on small entities.

Since the only costs of this action would be those associated with preparation and submission of the SIP revision, EPA has determined that this proposed action would not include a Federal mandate that may result in expenditures of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector in any one year. Accordingly, this proposed action is not subject to the requirements of sections 202 or 205 of the unfunded mandates reform act (UMRA).

In addition, since the only regulatory requirements of this proposed action would apply solely to the State of Utah, this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

Since this proposed action would impose requirements only on the State of Utah, it also does not have tribal implications. It would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This proposed action also does not have Federalism implications because it would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it would simply maintain the relationship and the distribution of power and responsibilities between EPA and the states as established by the CAA. This proposed SIP call is required by the CAA because EPA believes the current SIP is substantially inadequate to attain or maintain the NAAQS or comply with other CAA requirements. Utah's direct compliance costs would not be substantial because the proposed SIP call would require Utah to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements.

EPA interprets Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it would not establish an environmental standard, but instead would require Utah to revise a state rule to address requirements of the CAA.

Section 12 of the National Technology Transfer and Advancement Act of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with the National Technology Transfer and Advancement Act, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. In making a finding of a SIP deficiency, EPA's role is to review existing information against previously established standards. In this context, there is no opportunity to use VCS. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

This proposed action would not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), since it would only require the State of Utah to revise UAC R307–107 to address requirements of the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 10, 2010.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2010–29237 Filed 11–18–10; 8:45 am]

BILLING CODE 6560–50–P

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temporary safety zone. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add section § 165.T09–0165 to read as follows:

§ 165.T09–0165 Safety zone; Ford Estate Wedding Fireworks, Lake St. Clair, Grosse Pointe Shores, MI.

(a) *Location.* The safety zone will encompass all U.S. navigable waters on Lake St. Clair within a 420 foot radius of the fireworks barge launch site located off the shore of Grosse Pointe Shores, MI at position 42°27′15.06″ N., 082°51′59.01″ W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective and will be enforced from 8:30 p.m. (local) through 9:30 p.m. on June 4, 2011.

(c) *Regulations.* (1) In accordance with the general regulations in Section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so.

(5) Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: April 5, 2011.

J.E. Ogden,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. 2011–9256 Filed 4–15–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2010–0909; FRL–9294–9]

Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the Clean Air Act (CAA), EPA is finding that the Utah State Implementation Plan (SIP) is substantially inadequate to attain or maintain the national ambient air quality standards (NAAQS) or to otherwise comply with the requirements of the CAA and issuing a call for the State of Utah to revise its SIP. Specifically, the SIP includes Utah's unavoidable breakdown rule (rule R307–107), which exempts emissions during unavoidable breakdowns from compliance with emission limitations. This rule undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on to ensure attainment or maintenance of the NAAQS or meet other CAA requirements. EPA is requiring that the State revise the SIP to remove R307–107 or correct its deficiencies and submit the revised SIP to EPA within 18 months of the effective date of this final rule. If EPA finds that Utah has failed to submit a complete SIP revision as required by this final rule or if EPA disapproves such a revision, such a finding or disapproval will trigger clocks for mandatory sanctions and an obligation for EPA to impose a Federal Implementation Plan (FIP). If EPA makes such a finding or disapproval, mandatory sanctions will apply such that the offset sanction would apply 18 months after such finding or disapproval and highway funding restrictions would apply six months later unless EPA takes action to stay the imposition of the sanctions or to stop the sanctions clock based on the State curing the SIP deficiencies.

In its proposed rulemaking action, EPA requested comment on whether it should exercise its discretionary authority under CAA section 110(m) to impose the highway funding restrictions sanctions in areas of the State that would not be subject to mandatory sanctions. EPA is deferring a decision on whether to impose sanctions under section 110(m) and will consider any comments on the issue of imposing sanctions under section 110(m) if and when we take final action on this issue in the future.

DATES: *Effective Date:* This final rule is effective May 18, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2010–0909. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov,* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Vanessa Hinkle, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6561, or *hinkle.vanessa@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, the following definitions apply:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

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(iii) The initials *NAAQS* mean or refer to National Ambient Air Quality Standards.

(iv) The initials NO_X mean or refer to nitrogen oxides.

(v) The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers.

(vi) The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers.

(vii) The initials *ppm* mean or refer to parts per million.

(viii) The initials *SIP* mean or refer to State Implementation Plan.

(ix) The initials SO_2 mean or refer to sulfur dioxide.

(x) The initials *SSM* mean or refer to startup, shutdown, and malfunction.

(xi) The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.

(xii) The initials *UBR* mean or refer to the Utah unavoidable breakdown rule, R307–107.

(xiii) The initials *UDAQ* mean or refer to the Utah Division of Air Quality, Utah Department of Environmental Quality.

(xiv) The words *1982 Policy* mean or refer to the September 28, 1982 EPA Memorandum signed by Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions."

(xv) The words *1983 Policy* mean or refer to the February 15, 1983 EPA Memorandum signed by Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, titled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions."

(xvi) The words *1999 Policy* mean or refer to the September 20, 1999 EPA Memorandum signed by Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, titled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown."

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I. Background

On November 19, 2010, we published our proposed rulemaking action in the **Federal Register** (75 FR 70888) in which we proposed to find the Utah SIP substantially inadequate to attain or maintain the NAAQS or to otherwise comply with the requirements of the CAA.[1] We also proposed to issue a SIP call to require the State of Utah to revise the SIP to correct the inadequacies. In our proposal, we stated that, "Utah rule R307–107 contains various provisions that are inconsistent with EPA's interpretations regarding the appropriate treatment of malfunction events in SIPs and which render the Utah SIP substantially inadequate." *Id.* at 70891. We went on to identify specific deficiencies in R307–107 (also known as Utah's unavoidable breakdown rule and sometimes referred to herein as the UBR). *Id.* at 70891–70893. In particular, we explained that the UBR: (1) Does not treat all exceedances of SIP and permit limits as violations; (2) could be interpreted to grant the Utah executive secretary exclusive authority to decide whether excess emissions constitute a violation; and (3) improperly applies to Federal technology-based standards such as New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS). We explained why we were proposing to find that these deficiencies in the UBR render the Utah SIP substantially inadequate. *Id.* We proposed a 12-month deadline for the State to respond to a final SIP call.

We also proposed the order and timing of mandatory sanctions under CAA section 179(a) and requested comment on whether we should exercise our discretionary authority to impose highway funding sanctions in all areas of the State.

We requested comments on all aspects of our proposed action by December 20, 2010. We subsequently extended the public comment period through January 3, 2011. See 75 FR 79327 (December 20, 2010).

We received numerous comments. A number of commenters, particularly citizens and environmental groups, supported our proposed action. We also received a number of comments, primarily from State agencies and industrial facilities and groups, that were critical of our proposed action.

II. Final Action

We have considered all comments submitted and prepared responses, which are contained in Section IV of this action, "Issues Raised by Commenters and EPA's Responses." None of the comments has caused us to conclude that our proposal was unreasonable, and we are finalizing our action as proposed, with the exception that we are requiring that the State respond to the SIP call within 18 months rather than 12 months. Specifically, for the reasons described in our notice of proposed rulemaking (see 75 FR 70888) and in this action, EPA finds that the Utah SIP is substantially inadequate to attain or maintain the NAAQS or to otherwise comply with requirements of the CAA due to significant deficiencies created by Utah's unavoidable breakdown rule, R307–107.[2] Utah's rule R307–107 improperly undermines EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on in the SIP to ensure attainment and maintenance of the NAAQS or meet other CAA requirements. Pursuant to sections 110(a)(2)(H) and 110(k)(5) of the CAA, EPA is requiring that the State revise the SIP to remove R307–107 or revise it to make it consistent with CAA requirements. Utah must submit a revised SIP responding to this SIP call within 18 months of the effective date of this final rule.

If Utah fails to submit a complete SIP revision that responds to this final SIP call, section 179(a) of the CAA provides for EPA to issue a finding of State failure. Such a finding will start mandatory 18-month and 24-month sanctions clocks and a 24-month clock for promulgation of a FIP by EPA. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review (NSR) program and restrictions on highway funding.

EPA issued an order of sanctions rule in 1994 (see 59 FR 39832 (August 4, 1994), codified at 40 CFR 52.31) but did not specify the order of sanctions where a State fails to submit or submits a deficient SIP in response to a SIP call. However, as we proposed (75 FR 70893–

[1] Our proposal provided detailed background information regarding EPA's CAA interpretations with respect to SIP malfunction provisions, the history of Utah rule R307–107 and relevant SIP actions, and our interactions with the State and others regarding the rule over the years. See 75 FR 70889–891. We direct the reader there for such background information.

[2] We provide a summary of the bases for our finding of substantial inadequacy in Section III of this action, "Summary of Bases for Finding of Substantial Inadequacy."

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70894), we have decided that the order of sanctions specified in 40 CFR 52.31 will apply here for the same reasons discussed in the preamble to that rule. Thus, if Utah fails to submit the required SIP revision, or submits a revision that EPA determines is incomplete or that EPA disapproves, the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment NSR program 18 months following such a finding or disapproval unless the State corrects the deficiency before that date. The highway funding restrictions sanction will also apply six months after the offset sanction applies unless the State corrects the deficiency before that date. The provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions will also apply.

Mandatory sanctions under section 179 of the CAA generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment.[3] Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, EPA interprets the section 179 sanctions to apply only in the area or areas of the State that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. In this case, mandatory sanctions would apply in all areas designated nonattainment for a NAAQS within the State because Utah rule R307–107 applies statewide and applies for all NAAQS pollutants.

In addition to sanctions, if EPA finds that the State failed to submit a complete SIP revision that responds to this SIP call or disapproves such revision, CAA section 110(c) would require EPA to promulgate a FIP no later than two years from the date of the finding or the disapproval if the deficiency has not been corrected.

In its proposed rulemaking action (75 FR 70893–70894), EPA also requested comment on whether it should exercise its discretionary authority under CAA section 110(m) to impose the highway funding restrictions sanction in areas of the State that would not be subject to mandatory sanctions—*i.e.,* areas other than nonattainment areas. EPA is not finalizing action on the use of such discretionary authority in this action. If EPA acts on the use of discretionary sanctions at a later date, it will fully respond to relevant comments submitted in response to the November 19, 2010 notice of proposed rulemaking.

III. Summary of Bases for Finding of Substantial Inadequacy

This section provides a brief summary of the bases for our finding of substantial inadequacy. For further detail, please refer to our notice of proposed rulemaking (75 FR 70888) and our response to comments.

1. R307–107–1 provides an exemption from emission limits in the Utah SIP and SIP-based permits for exceedances of such limits caused by an unavoidable breakdown—"emissions resulting from unavoidable breakdown will not be deemed a violation of these regulations." This generic exemption, applicable to all Utah SIP limits, precludes any enforcement when there is an unavoidable breakdown. Our interpretation of the CAA is that an exemption from injunctive relief is never appropriate, and that an exemption from penalties is only appropriate in limited circumstances.[4] Contrary to CAA section 302(k)'s definition of emission limitation, the exemption in the UBR renders emission limitations in the Utah SIP less than continuous and, contrary to the requirements of CAA sections 110(a)(2)(A) and (C), undermines the ability to ensure compliance with SIP emissions limitations relied on to achieve the NAAQS and other relevant CAA requirements at all times. Therefore, the UBR renders the Utah SIP substantially inadequate to attain or maintain the NAAQS or to comply with other CAA requirements, such as CAA sections 110(a)(2)(A) and (C) and 302(k), CAA provisions related to prevention of significant deterioration (PSD) and nonattainment NSR permits (sections 165 and 173), and provisions related to protection of visibility (section 169A).

2. R307–107–1 also applies to Federal technology-based standards like the NSPS and NESHAPS that Utah has incorporated by reference to receive delegation of Federal authority. To the extent any exemptions from these technology-based standards are warranted for malfunctions, the Federal standards contained in EPA's regulations already specify the appropriate exemptions. No additional exemptions (or criteria for deciding whether an applicable exemption applies) are warranted or appropriate. Thus, the Utah SIP is substantially inadequate because R307–107–1 improperly provides an exemption and criteria not contained in and not sanctioned by the delegated Federal standards.

3. R307–107–2 requires the source to submit information regarding an unavoidable breakdown to the executive secretary of Utah's Air Quality Board (UAQB) and indicates that the information "shall be used by the executive secretary of the UAQB in determining whether a violation has occurred and/or the need of further enforcement action." This provision appears to give the executive secretary exclusive authority to determine whether excess emissions constitute a violation and thus to preclude independent enforcement action by EPA and citizens when the executive secretary makes a non-violation determination. This is inconsistent with the enforcement structure under the CAA, which provides enforcement authority not only to the States, but also to EPA and citizens. Because a court could interpret section R307–107–2 as undermining the ability of EPA and citizens to independently exercise enforcement discretion granted by the CAA, it is substantially inadequate to comply with CAA requirements related to enforcement. Because it undermines the envisioned enforcement structure, it also undermines the ability of the State to attain and maintain the NAAQS and to comply with other CAA requirements related to PSD, visibility, NSPS, and NESHAPS. Potential EPA and citizen enforcement provides an important safeguard in the event a State cannot or does not enforce CAA violations and also provides additional incentives for sources to design, operate, and maintain their facilities so as to meet their emission limits. Thus, R307–107–2 renders the SIP substantially inadequate to attain or maintain the NAAQS or otherwise comply with the CAA.

IV. Issues Raised by Commenters and EPA's Response

A. Request for Comment Period Extension/Procedural Issues

(a) Comment: Two comment letters requested an extension of the comment period of up to 60 days. Other commenters did not specifically request an extension, but stated that they believed the comment period was too short. Some commenters complained that the proposal was issued without stakeholder input.

Response: We considered the requests for an extension of the comment period and extended the original 30-day public comment period from December 20,

[3] An exception to this, not relevant here, is areas located in the Ozone Transport Region, which are required to have a part D NSR program regardless of the area's designation. See CAA section 184(b)(2).

[4] As we explain in our response to comments, the UBR lacks criteria that are sufficiently detailed or robust to ensure that penalties are available at all appropriate times.

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2010 to January 3, 2011 (see 75 FR 79327 (December 20, 2010)), providing a total of 45 days to submit comments. The comment period was sufficient to provide a reasonable opportunity to comment on our proposed action given its scope. We note that section 307(h) of the CAA specifies a 30-day period as a minimum comment period for rulemaking actions under the CAA, except for certain specified provisions (all of which waive notice-and-comment rulemaking requirements). We typically provide a 30-day comment period for SIP-related actions. Neither the CAA nor the Administrative Procedure Act requires a stakeholder process before or during rulemaking to issue a SIP call.

(b) Comment: A commenter asserts that EPA's notice is defective because it fails to provide interested parties with sufficient notice of facts, policies and case law relevant to the proposed finding. Interested parties cannot understand the bases for EPA's proposed rule and thus cannot participate and comment in a meaningful way. EPA needs to correct the deficiencies in the notice and re-propose.

Response: As described more fully elsewhere in our response to comments, we explained the bases for our finding of substantial inadequacy and SIP call in our proposed rulemaking action. See 75 FR 70891–70893.

(c) Comment: A commenter asserts that it cannot provide meaningful comments and analysis of the proposed rule because EPA has not responded to the commenter's appeal seeking documents under the Freedom of Information Act (FOIA).

Response: We disagree that our actions under the FOIA are relevant to the validity of our rulemaking action. In this case, we clearly explained the bases for our proposed action, and made available in our rulemaking docket all documents we considered in issuing the proposal. The commenter had the same reasonable opportunity to comment on our proposal as any other commenter and provided substantive comments.

We note that we responded to the commenter's FOIA request on June 7, 2010, providing three compact discs containing over 1,000 pages of documents. We only withheld documents we determined were privileged (and thus exempt from disclosure).

B. Authority and Basis for a SIP Call

(a) Comment: The proposal is inconsistent with section 110 of the CAA. Commenters assert that EPA's authority to issue a SIP call under CAA section 110(k)(5) is limited to if the Administrator finds the applicable implementation plan for an area is substantially inadequate to attain or maintain the relevant NAAQS or to otherwise comply with any requirement of that chapter. Commenters assert that EPA has made no showing or disclosure of relevant facts that the UBR is substantially inadequate to protect the NAAQS with respect to CAA sections 110(a)(2)(H) and 110(k)(5). Commenters state that the finding of substantial inadequacy must be clearly stated and that the Administrative Record must present facts which support the SIP call. Commenters state that EPA's docket did not identify any measured or modeled impact on attainment or maintenance of a NAAQS due to excess emissions resulting from an unavoidable breakdown. Further, EPA did not provide any empirical information to support its reasoning as to why the rule is not working.

Response: The SIP call is consistent with CAA sections 110(a)(2)(H) and 110(k)(5). We proposed to find the UBR substantially inadequate in our NPR and are finalizing that determination here. We explained the bases for our proposed finding. See 75 FR 70891–70893. As we indicated in our proposal, SIPs, including the Utah SIP, rely on adoption and enforcement of emission limits to attain and maintain the NAAQS, protect PSD increments, protect visibility in national parks and wilderness areas, and meet other CAA requirements. See 75 FR 70891. The integrity of the SIP is maintained and protection is ensured as long as the limits are met. Consistent with this premise, the CAA and our regulations require that SIP limits be enforceable. For example, as noted in our proposal (see 75 FR 70892), CAA section 110(a)(2)(A) requires each SIP to include enforceable emission limitations necessary or appropriate to meet the CAA's applicable requirements. CAA section 110(a)(2)(C) requires that each SIP include a program to "provide for the enforcement of the measures" described in section 110(a)(2)(A). Section 302(k) defines emission limitation as a requirement established by a State or EPA that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." These requirements are intended to ensure attainment and maintenance of the NAAQS, protection of increments, and protection of visibility at all times, not just occasionally or intermittently. The enforceability of the SIP is fundamental to the SIP's adequacy under the CAA.

The UBR provides an exemption from emission limits in the Utah SIP (and permits) for excess emissions caused by an unavoidable breakdown—"emissions resulting from unavoidable breakdown will not be deemed a violation of these regulations." See R307–107–1. Our longstanding view is that all exceedances are violations and must be treated as such by the SIP. See, *e.g.,* our 1982, 1983, and 1999 Policies; 42 FR 58171 (November 8, 1977). This treatment is necessary because it encourages sources to act responsibly in taking necessary measures to ensure compliance with emissions limits, preserves the potential for injunctive relief, preserves the potential for penalties, except in limited circumstances, and is consistent with the notion that protection of health under the CAA is not a sometime requirement. It is also consistent with CAA 302(k)'s definition of emission limitation as a requirement limiting emissions on a continuous basis. The UBR precludes any enforcement when there is an unavoidable breakdown. It thus renders emission limitations in the Utah SIP less than continuous and, contrary to the requirements of sections 110(a)(2)(A) and (C), undermines the ability to ensure compliance with emissions limitations and the NAAQS and other relevant CAA requirements at all times. Therefore, the UBR renders the Utah SIP substantially inadequate to attain or maintain the NAAQS or to comply with other CAA requirements.

We also explained in our proposal that R307–107–2 appears to give the executive secretary of the UAQB exclusive authority to determine whether excess emissions have been caused by an unavoidable breakdown and, thus, whether they constitute a violation. R307–107–2 provides that information submitted by a source "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." We explained that this provision is inconsistent with the enforcement structure of the CAA, which provides independent authority to EPA and citizens to enforce SIP and other CAA emission limits. See 75 FR 70892. We concluded that, because a court could interpret R307–107–2 as undermining the ability of EPA and citizens to independently exercise enforcement discretion granted by the CAA, it is inconsistent with CAA requirements related to enforcement and, thus, renders the SIP substantially inadequate. Preclusion of EPA and citizen enforcement could make it impossible to penalize source noncompliance (where the State may have erroneously concluded that

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exceedances were caused by an unavoidable breakdown) or gain source compliance through injunctive relief. Also, potential preclusion of EPA and citizen enforcement reduces the incentive for sources to comply because it reduces the likelihood of independent evaluation of unavoidable breakdown claims by a court in an enforcement action brought by EPA or citizens.

The thrust of several comments is that we have not presented facts or empirical evidence that the UBR is not working or that shows any measured or modeled impact on attainment or maintenance of a NAAQS due to excess emissions resulting from an unavoidable breakdown. As we indicated in our proposal (see 75 FR 70892), we need not show a direct causal link between any specific unavoidable breakdown excess emissions and violations of the NAAQS to conclude that the SIP is substantially inadequate. It is our interpretation that the fundamental integrity of the CAA's SIP process and structure is undermined if emission limits relied on to meet CAA requirements can be exceeded without potential recourse by any entity granted enforcement authority by the CAA. We are not restricted to issuing SIP calls only after a violation of the NAAQS has occurred or only where a specific violation can be linked to a specific excess emissions event. It is sufficient that emissions limits to which the unavoidable breakdown exemption applies have been, are being, and will be relied on to attain and maintain the NAAQS and meet other CAA requirements. Nor are we required to wait for a judge to rule in a specific enforcement action that R307–107–2 has a preclusive effect on EPA or citizen enforcement to determine that the provision is inconsistent with the CAA and renders the SIP substantially inadequate.[5]

Nonetheless, we note the following:

1. Several counties along the Wasatch Front in Utah (which includes the largest population centers in the State) are designated nonattainment for PM_{10}, $PM_{2.5}$, and SO_2, and some have recorded violations of the 2008 0.075 ppm ozone NAAQS as well. The Wasatch Front is subject to severe wintertime inversions, and several commenters noted that Salt Lake County has at times experienced some of the worst air quality in the country. Exceedances of emission limitations due to unavoidable breakdowns increase pollutant levels in the air in these nonattainment areas, exacerbating pollution there.[6]

2. Our experience related to refineries, power plants, and other sources indicates that potential emissions during malfunctions when normal processes or pollution controls are bypassed can be very high, far exceeding SIP limits. For example, data submitted by Holly Refining (Holly) in Woods Cross, Utah, to the State of Utah indicate that Holly flared nearly 11,000 pounds of SO_2 in a 9-hour period during a claimed breakdown event in June 2006 and thousands of pounds during other claimed breakdown events of varying duration (some on the order of one hour) between 2006 and 2010. By way of comparison, the January 12, 2010 permit limit for Holly's SRU tail gas incinerator is 1.6 tons (3,200 pounds) of SO_2 per day.[7] During malfunctions, refineries in the Billings, Montana, area sometimes flared thousands of pounds of SO_2 over a two- or three-hour period, whereas the State had modeled attainment of the 3-hour SO_2 NAAQS based on a routine flare emissions limit of 150 pounds per three hours. If Montana had modeled the higher emissions, other emission limits would have had to have been greatly curtailed for the area to demonstrate attainment of the NAAQS. Our experience indicates that the flare emissions at Holly and in Montana are not unique. See, *e.g.,* EPA Enforcement Alert, Volume 3, Number 9, October 2000, "Frequent, Routine Flaring May Cause Excessive, Uncontrolled Sulfur Dioxide Releases," which we have included in the docket for this action. Similarly, our experience indicates that power plant emissions during malfunctions can greatly exceed emissions during routine operations.

3. A report by the Environmental Integrity Project, which we included in the record for our notice of proposed rulemaking, also indicates that malfunction emissions can dwarf SIP and permit emissions limits. See "Gaming the System," August 2004, docket no. EPA–R08–OAR–2010–0909–0042, pages 2, 5–9. See also, EPA Enforcement Alert cited above, p. 2.

We also proposed other bases for our finding of substantial inadequacy. As we indicated in our notice of proposed rulemaking, the UBR not only applies to SIP limits, but also to permit limits and national technology-based standards like the NSPS and NESHAPS. See 75 FR 70892.

This means a source could use the provisions of R307–107 to claim an exemption from best available control technology (BACT) or lowest achievable emission rate (LAER) limits in a major source permit. We have consistently interpreted the Act to not allow for outright exemptions from BACT limits, and the same logic applies to LAER limits. See, *e.g.,* 1977 memorandum entitled "Contingency Plan for FGD Systems During Downtime as a Function of PSD," from Edward E. Reich to G.T. Helms and January 28, 1993 memorandum entitled "Automatic or Blanket Exemptions for Excess Emissions During Startup and Shutdowns under PSD," from John B. Rasnic to Linda M. Murphy. As noted, in order to ensure non-degradation of air quality at all times under the PSD program and protection of the NAAQS at all times, it is necessary for a source to comply with its permit limits at all times.

To the extent any exemptions from the NSPS or NESHAPS are warranted, the Federal standards contained in EPA's regulations already specify the appropriate exemptions. See, *e.g.,* 40 CFR 60.48Da(c).[8] No additional exemptions or criteria are warranted or appropriate. See, *e.g.,* 40 CFR 60.10(a); 40 CFR 63.12(a)(1); and the 1999 Policy, Attachment, at 3.[9] Furthermore, in *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), the DC Circuit determined that exemptions from compliance with CAA section 112 Maximum Achievable Control Technology (MACT) standards during periods of SSM were inconsistent with CAA section 302(k), which requires continuous compliance with emission limits. Thus, R307–107–1 is substantially inadequate because it improperly provides an exemption and grants discretion to the Utah executive secretary not contained in and not sanctioned by the delegated Federal standards.

[5] EPA has previously issued SIP calls to correct deficiencies related to SIP enforceability. For example, EPA issued SIP calls in the 1990s to require States to revise their SIPs to allow for use of any credible evidence in enforcement actions with respect to SIP emissions limits. See 62 FR 8314, 8327 (February 24, 1997).

[6] In 2005, the State submitted a maintenance plan for PM_{10} for Salt Lake County. The State's dispersion modeling, which we proposed to disapprove because of flaws, projected values very close to the 150 $\mu g/m^3$ 24-hour NAAQS at the North Salt Lake monitor. If the State had used assumptions we had proposed, the projected values would have been higher. Malfunction emissions are of particular concern where modeling predicts values just under the NAAQS.

[7] In its 2005 SIP submittal for PM_{10}, the State proposed a combined SO_2 emission limit for Holly, which included all external combustion process equipment and all gas-fired compressor drivers, of 4.7 tons per day.

[8] Some NSPS do not provide any relief during SSM. For example, the SO_2 and NO_X limits under part 60, subpart Db, apply at all times. See 40 CFR 60.45b(a) and 60.46b(a).

[9] As EPA noted in the 1999 Policy, "to the extent a state includes NSPS or NESHAPS in its SIP, the standards should not deviate from those that were federally promulgated. Because EPA set these standards taking into account technological limitations, additional exemptions would be inappropriate."

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(b) Comment: Commenters state that EPA is incorrect in its interpretation and reliance on a number of court decisions used in part to justify the SIP Call. Commenters indicate that *Michigan DEQ* v. *Browner* and *Arizona Public Service Co.* v. *EPA* are not relevant. Commenters state that EPA fails to mention other cases, such as *Sierra Club* v. *Georgia Power,* which commenters allege are more on point and do not support EPA's proposed SIP call. Commenters also criticize EPA's citation of *Sierra Club* v. *EPA,* and claim that EPA's "broad interpretation" is at odds with a July 2009 letter from Adam Kushner to industry.

Response: Our action is based on our longstanding interpretation of the CAA, which is reflected in our 1999 and earlier policy statements, among other locations. As we noted in our proposal (see 75 FR 70890), *Arizona Public Service Co.* v. *EPA,* 562 F.3d 1116, 1129 (10th Cir. 2009) held that our 1999 Policy was a "reasonable interpretation of the Clean Air Act." The court in *Michigan DEQ* v. *Browner,* 230 F.3d 181, 186 (6th Cir. 2000) similarly found that EPA's interpretation of section 110, as explained in the 1982 and 1983 Policies, was reasonable and held that "EPA reasonably concluded that Michigan's proposed SIP revision did not meet the requirements of the CAA."

Contrary to commenters' arguments, these cases are relevant to our action. The courts agreed with EPA that it is not appropriate under CAA section 110 to provide or approve an outright exemption from SIP emission limitations, and the *Michigan DEQ* court upheld EPA's determination that Michigan's defective SSM revisions did not meet the requirements of the CAA.

Commenters suggest that these cases are irrelevant because they didn't involve a SIP call. However, if, as these courts held, EPA's interpretation is reasonable—that a malfunction provision that provides an exemption from an emission limit does not meet the minimum requirements of CAA section 110—then logic leads to the conclusion that the provision is substantially inadequate to meet section 110's requirements with respect to SIP compliance and enforceability.

EPA's past approval of a provision that fails to meet the minimum requirements of the Act does not render the provision compliant, something EPA plainly acknowledged in its various policy statements over the years. The SIP call provisions of the Act provide EPA with one of the only means to revisit SIP decisions that may have been wrong or ill-considered, or that have been brought into greater focus with the passage of time and development of relevant knowledge and case law.

Contrary to commenters' assertion, we did refer to *Sierra Club* v. *Georgia Power Co.* in our proposal at 75 FR 70892, n. 7, but inadvertently omitted the case name. We disagree that the case "is more analogous" or "contradicts EPA's current interpretation." The case merely held that EPA's 1999 policy did not change the existing Georgia SIP, a proposition we agree with and have acted in accordance with here. See EPA's December 5, 2001 clarification of the 1999 Policy, which is in the docket. If we thought the policy trumped the approved SIP, there would be no need to issue a SIP call now. As *Sierra Club* v. *Georgia Power Co.* suggested, we are issuing a SIP call to ensure that the Utah SIP meets the minimum requirements of the CAA. See 443 F.3d 1346, 1355 (11th Cir. 2006).

Regarding *Sierra Club* v. *EPA,* 551 F.3d 1019 (DC Cir. 2008), while we did not cite the case as the main basis for our SIP call, we remain convinced it is relevant even though it addressed the hazardous air pollutant (HAP) regulations. In particular, the court significantly relied on section 302(k)'s definition of emission standard (as a requirement that limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis) to reach its ultimate holding disallowing EPA's exceptions from the MACT standards and attempted reliance on the general duty to minimize emissions. As with MACT standards, there is no indication that Congress intended compliance with NAAQS, or compliance with emission limits relied on to attain and maintain the NAAQS, be anything less than continuous. Also, we disagree with the comment that the UBR does not provide an express exemption from SIP and other emission limits. The UBR states that "emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations." This is an exemption. The provisions in the UBR requiring that an owner/operator take "reasonable" measures to reduce emissions resulting from an unavoidable breakdown are analogous to the general duty provisions in EPA's MACT provisions. The *Sierra Club* court found these general duty requirements were not a substitute for a 112 emission standard. Here, we find the emissions minimization requirements in the UBR are not a substitute for continuously applicable emission limitations that support attainment and maintenance of the NAAQS, and protection of PSD increments and visibility.

We also disagree that our views contradict the views Adam Kushner (EPA's Director of the Office of Civil Enforcement) expressed in his July 2009 letter to industry representatives. Mr. Kushner was delineating which MACT standards were directly affected by the court's ruling and how they would be affected. Mr. Kushner was not expressing an opinion about the import of the Court's decision for other types of emission standards and limitations. We also find noteworthy the following language from Mr. Kushner's letter: "Although these provisions [source-category specific SSM provisions] will remain in effect following the issuance of the mandate in *Sierra Club,* EPA recognizes that the legality of such source category-specific SSM provisions may now be called into question, and EPA intends to evaluate them in light of the court's decision." EPA has since revised or proposed to revise several MACT standards with source-specific malfunction provisions to eliminate the exemptions from compliance during periods of malfunction. See, *e.g.,* 76 FR 15608 (March 21, 2011); 75 FR 54970 (September 9, 2010); 75 FR 65068 (October 21, 2010).

(c) Comment: EPA lacks the regulatory authority to make a SIP call based on policy or guidance that has not become applicable law. The 1999 Policy EPA cites as justification for the SIP Call has never been subjected to the legal requirements of notice and public rulemaking under the Administrative Procedures Act. In addition, commenters assert that if EPA were authorized to regulate through policy, it would be inappropriate in this case because the 2001 Policy [10] clarifies that the 1999 Policy was not intended to alter the status of any existing malfunction, startup, or shutdown provisions in a SIP that had been approved by EPA.

Response: The 1999 Policy reflects our interpretation of the CAA. We have not treated it as binding on the States or asserted that it changed existing SIP provisions. Instead, we have done what commenters argue is necessary—we have engaged in notice and comment rulemaking to determine whether a SIP call is appropriate in this case. Through this rulemaking action, we have evaluated provisions of the Utah SIP to determine whether they are consistent with our interpretation of the CAA as reflected in our policies. We provided commenters with the opportunity to

[10] "Re-Issuance of Clarification—State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown," Eric Schaefer and John Seitz, December 5, 2001.

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comment on the proposed SIP call and our basis for it, and are only finalizing the SIP call after carefully considering commenters' comments.[11] To the extent some commenters may be arguing that we must conduct national rulemaking on our policy before we can conduct SIP call rulemaking with respect to a specific State malfunction provision, we find no basis for this assertion in the CAA. We have evaluated the UBR, found it substantially inadequate as specified in the CAA, and issued a SIP call as required. The process we have followed and the substance of our action are reasonable.

Commenters emphasize our failure to specifically cite our December 5, 2001 clarification to the 1999 Policy, in which we indicated that the 1999 Policy was not intended to "alter the status of any existing malfunction, startup or shutdown provision in a SIP that has been approved by EPA."[12] The 2001 clarification merely states the obvious well-understood principle—that an approved SIP remains the approved SIP unless or until EPA undertakes rulemaking action to revise the SIP. See *General Motors* v. *United States,* 496 U.S. 530, 540–541 (1990). In other words, the 1999 Policy did not modify existing SIP provisions. Here, "in the context of future rulemaking" as contemplated by the 2001 clarification, we have considered "the Guidance and the statutory principles on which the Guidance is based." See December 5, 2001 clarification.

One commenter argues that the 2001 clarification "clarifies the 1999 Policy does not apply to" the UBR. On the contrary, because the UBR addresses the treatment of excess emissions resulting from an unavoidable breakdown, EPA's interpretations reflected in the 1999 Policy are clearly relevant. Also, nothing in the 2001 clarification rejected EPA's statement in the 1999 Policy that all EPA Regions "should review the SIPs for their states in light of this clarification and take steps to insure that excess emissions provisions in these SIPs are consistent with the attached guidance." As provided above, the sole purpose of the 2001 clarification was to expressly state that the policy—standing alone—did not serve to change the terms of an approved SIP.

(d) Comment: EPA's proposed SIP call is justified regardless of its reliance on guidance. Commenter explains that Utah's SIP cannot possibly assure the NAAQS and other CAA requirements will be met if the SIP allows a blanket exemption from emission limits, particularly because the effectiveness of Utah's SIP is premised upon compliance with emission limits.

Response: Our SIP call relies on our interpretations of the CAA as reflected in numerous policy statements and actions over the years. Otherwise, we agree with the commenter.

(e) Comment: Commenters assert that EPA's SIP call is inconsistent when compared with other EPA SSM polices such as those for NSPS in 40 CFR 60.8(c).

Response: Emission limitations in SIPs must ensure ambient levels of criteria pollutants that attain and maintain the NAAQS. For purposes of demonstrating attainment and maintenance, States assume source compliance with emission limitations at all times. Thus, provisions that exempt compliance during SSM undermine the integrity of the SIP. This principle underlies EPA's interpretations regarding SIP SSM provisions as reflected in our various policy statements over the years. For example, in our 1999 Policy we stated the following:

> "EPA has a fundamental responsibility under the Clean Air Act to ensure that SIPs provide for attainment and maintenance of the national ambient air quality standards ("NAAQS") and protection of PSD increments. Thus, EPA cannot approve an affirmative defense provision that would undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the Clean Air Act. See sections 110(a) and (l) of the Clean Air Act * * * Accordingly, an acceptable affirmative defense provision may only apply to actions for penalties, but not to actions for injunctive relief.
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> * * * * *
>
> Generally, since SIPs must provide for attainment and maintenance of the national ambient air quality standards and the achievement of PSD increments, all periods of excess emissions must be considered violations. Accordingly, any provision that allows for an automatic exemption for excess emissions is prohibited.
>
> * * * * *
>
> Automatic exemptions might aggravate ambient air quality by excusing excess emissions that cause or contribute to a violation of an ambient air quality standard."

Similarly, in our 1982 Policy, we stated the following:

> "The rationale for establishing these emissions as violations, as opposed to granting automatic exemptions, is that SIPs are ambient-based standards and any emissions above the allowable may cause or contribute to violations of the national ambient air quality standards."

Thus, EPA has long said that automatic exemptions from SIP emission limits are not appropriate because the SIPs are for the purpose of ensuring health-based standards are met and maintained.[13]

NSPS and other technology-based standards, on the other hand, do not have to ensure attainment of the NAAQS. Instead, CAA section 111(a)(1) provides that a new source "standard of performance" must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements)" EPA determines has been "adequately demonstrated." Thus, historically, EPA has held different interpretations regarding the proper treatment of excess emissions during SSM under health-based standards addressed in SIPs and the NSPS technology-based standards.[14] In the SIP context, and in the context of SIP-based permits, EPA's interpretation of the CAA is reasonable, and it is reasonable for EPA to require that Utah revise the UBR or remove it from the SIP.

(f) Comment: The Utah UBR has been federally-approved in the SIP for over 30 years. Based on empirical UDAQ monitoring since that approval, the Utah UBR has not contributed to a NAAQS exceedance.

Response: As indicated above, we disagree that the commenters' suggested test—whether there is demonstrated proof that a specific excess emission event allowed under the UBR has contributed to a specific monitored

[11] We have applied the interpretation reflected in our policies in a number of other rulemaking actions. See, *e.g.,* the Billings/Laurel Federal Implementation Plan, 73 FR 21418 (April 21, 2008); approvals of Colorado SSM rules, 71 FR 8958 (February 22, 2006) and 73 FR 45879 (August 7, 2008); partial approval and partial disapproval of Texas SSM rules, 75 FR 26892 (May 13, 2010) and 75 FR 68989 (November 10, 2010); disapproval of Michigan SSM rules, 63 FR 8573 (February 20, 1998); approval of Maricopa County, Arizona SSM rules, 67 FR 54957 (August 27, 2002).

[12] We included the 2001 clarification in the docket for our proposal but did not cite it specifically.

[13] The 1999 Policy defines "automatic exemption" as "a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations." The UBR provides such an automatic exemption: "Except as otherwise provided in R307–107, emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations." In this notice, we also refer to this as an outright exemption or an exemption.

[14] As we noted in our proposal and elsewhere in this action, however, the 2008 *Sierra Club* case held that EPA rules exempting major sources from technology-based NESHAP standards during SSM periods violated the CAA's requirement in section 112 that some standard meeting that provision's substantive requirements apply continuously. *Sierra Club* v. *EPA,* 551 F.3D 1019, 1028 (DC Cir. 2008).

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NAAQS exceedance—is the test we must use. As stated above, for purposes of demonstrating attainment and maintenance of the NAAQS (and for protecting PSD increments and visibility), States assume source compliance with SIP emission limitations at all times.[15] Thus, it is reasonable to insist that the SIP not interfere with or undermine the ability to enforce compliance with SIP limitations at all times. The UBR fails this test for the reasons already stated.

In addition, even if the commenters were correct that the sole reasonable test is whether the UBR has contributed to a monitored exceedance of the NAAQS, we cannot discern whether commenters are saying there has never been a breakdown event on a day when a monitor has exceeded a NAAQS. (The commenters submitted no data regarding claims under the UBR.) However, based on monitored violations of the NAAQS, Utah has had areas designated nonattainment for various pollutants over the course of many years and continues to have nonattainment areas for $PM_{2.5}$, PM_{10}, and SO_2. Areas in Utah will likely be designated nonattainment for ozone again in the future. As noted in a prior response, malfunction-based emissions at stationary sources can lead to large emissions in a short period of time, and it is reasonable to conclude that excess emissions during malfunctions have contributed and/or have the potential to contribute to NAAQS exceedances and violations in the urbanized areas of Utah.[16] If EPA promulgates new, more stringent NAAQS, the potential for NAAQS exceedances and violations only increases.

Several commenters emphasize that the UBR has been in the SIP for more than 30 years and that EPA has approved it more than once. We first approved the UBR in 1980 only after stating in our 1979 proposed rulemaking action that we could not fully approve the UBR "because it exempts certain excess emissions from being violations of the Air Conservation Regulations" and only after opining that exemptions granted under the UBR would not apply as a matter of Federal law. See 44 FR 28688, 28691 (May 16, 1979).

Second, our approval of the UBR preceded the 1982 and 1983 Policies. These memoranda to EPA's Regional Administrators were issued in response to requests for clarification of EPA's policy regarding excess emissions during SSM. Presumably, these memoranda were issued because previously there had been some confusion about EPA's interpretation of the CAA on this issue. A comparison of the UBR to these policies reveals that the UBR did not and does not comport with the interpretation reflected in the policies. For example, the 1982 Policy states that EPA can approve SIP revisions that incorporate an "enforcement discretion approach" that requires the State agency to treat all excess emissions due to malfunctions as violations and commence a proceeding to notify the source of its violation. Then the State agency would determine whether to initiate an enforcement action based on specific, detailed criteria contained in the 1982 Policy. The UBR does not treat all excess emissions as violations, does not require the State to initiate a proceeding to notify the source of its violation, and does not contain the criteria consistent with those contained in the 1982 Policy. The 1982 Policy stated, "Where the SIP is deficient, the SIP should be made to conform to the present policy." Contrary to the 1982 Policy's directive, the SIP was not made to conform to the 1982 Policy.

We approved a revised version of the UBR in 1994 with no preamble discussion except to note that the Utah air rules had been renumbered and new requirements had been added to the SIP. See 57 FR 60149 (December 18, 1992) and 59 FR 35036 (July 8, 1994). There is no indication that EPA evaluated the substance of the UBR or any of the other re-numbered provisions that were already included as part of the approved SIP. *Id.* We also note that the 1994 approval preceded our 1999 Policy, which re-alerted EPA regional offices to the issues regarding SIP SSM rules, acknowledged that some existing SIPs included deficient SSM provisions, and directed the Regions to review the SIPs and seek to correct such provisions.

Subsequent to EPA's issuance of the 1999 Policy, we approved another renumbering of the Utah SIP, including a renumbering of the UBR. Again, EPA did not consider the substance of the UBR, but did expressly reference EPA's ongoing concerns with SIP rules and specifically noted that Utah had committed to address those concerns, which included concerns with the UBR. We indicated that we would "continue to require the State to correct any rule deficiencies despite EPA's approval" of the recodification. See 70 FR 59681, 59683 (October 13, 2005).

In other words, we indicated in the 1979 proposal that preceded our 1980 approval that we could not fully approve the UBR because it provided exemptions from violations, and in our subsequent actions, we did not reanalyze the adequacy of the rule. However, we did indicate in our most recent re-numbering approval our intent to require the State to correct the deficiencies in the UBR.

Furthermore, since EPA issued the 1999 Policy, we have been working with Utah in an attempt to change the UBR on a cooperative basis. As noted in our proposal, Utah acknowledged that the provision could benefit from clarification and initiated rulemaking toward that end. In an April 18, 2002 letter, Utah also specifically committed to address our concerns with the rule. See 75 FR 70891. However, Utah never completed a change to the UBR despite our substantial efforts to help Utah develop a revised rule that would meet CAA requirements. *Id.* The delay that has resulted from our attempt to reach a consensus-based solution does not diminish our authority to issue a SIP call.

(g) Comment: Commenter asserts that "there must be evidence of new information that would explain how Utah's SIP has somehow been transformed from adequate to substantially inadequate." Commenter cites *Clean Air Implementation Project* v. *EPA,* 150 F.3d 1200, 1207 (DC Cir. 1998) for this proposition. Commenter asserts that no such information has been provided.

Response: Commenter's interpretation would preclude EPA from changing its interpretations and conclusions over time or from determining that prior approvals were a mistake, and issuing a SIP call on such bases. CAA sections 110(a)(2)(H) and 110(k)(5) do not constrain us in that way, and *Clean Air Implementation Project* v. *EPA* did not hold that a SIP previously found by EPA to be adequate could not be subsequently found to be inadequate absent evidence of new information. On the contrary, the case did not involve a challenge to a SIP call at all, and the statements the commenter refers to were dicta involving a completely different set of facts.[17]

[15] We note that dispersion modeling, based on SIP emission limitations, is often required to demonstrate attainment and maintenance of the NAAQS because modeling can predict pollutant levels at receptor locations throughout an area, whereas monitors are limited in number and location. See, *e.g.,* 40 CFR 51.112; 40 CFR part 51, appendix W.

[16] Based on data in EPA's Air Quality System database for the years 2005 through 2010, there were 171 days during which the $PM_{2.5}$ NAAQS was exceeded at a monitor in Utah and 154 days during which the 2006 ozone NAAQS was exceeded at a monitor in Utah.

[17] *Clean Air Implementation Project* v. *EPA* addressed a challenge to EPA's credible evidence rule and held that the challenge was not ripe for decision.

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As a practical matter, our past decisions are not infallible. They reflect a decision made at a particular point in time by a particular set of individuals based on a particular understanding (or misunderstanding) of facts, policy, and law. Our 1999 Policy expressly recognizes this: "A recent review of SIPs suggests that several contain provisions that appear to be inconsistent with this policy, either because they were inadvertently approved after EPA issued the 1982–1983 guidance or because they were part of the SIP at that time, and have never been removed." 1999 Policy at 1. Further, the 1999 Policy advised all Regions to review the SIPs for their States in light of the clarification and take steps to insure that excess emissions provisions in these SIPs are consistent with the policy. *Id.* at 4. Similarly, EPA's 1982 Policy explained that the Agency, because it had been inundated with proposed SIPs in the early 1970's and had limited experience processing them, had not given sufficient attention to the "adequacy, enforceability, and consistency" of SSM provisions. Thus, "many SIPs were approved with broad and loosely-defined provisions to control excess emissions." 1982 Policy at 1.

The 1999 Policy can be viewed as refreshing EPA's institutional memory. It reiterated and clarified EPA's longstanding interpretation and provided direction to EPA's regional offices to review SIPs from their respective States. This caused EPA Region 8 to review SIPs for Utah and the other States within the region. As noted in our proposal, several Region 8 States have submitted revisions to their SSM rules in response to our review, and EPA has approved revised rules for Colorado and Wyoming. See 75 FR 70890. Our review of the Utah rule revealed that it was inconsistent with CAA requirements, and we initiated sustained efforts to get the State to revise the rule. The State did not revise the rule. See 75 FR 70890–70891.

A review of facts here indicates that EPA's 1980 approval of the UBR was ill-considered because even then our basic interpretation that all excess emissions must be treated as violations applied. As discussed in our proposal for this action, EPA said in its 1979 proposal on the UBR that EPA "may not fully approve Regulation 4.7 because it exempts certain excess emissions from being violations of the Air Conservation Regulations" but then proposed to approve the UBR anyway. Clearly, the regulation did not comport with EPA's interpretations regarding SSM provisions in SIPs. However, with almost no explanation, EPA justified its approval based on a conclusion that any exemptions granted by Utah "are not applicable as a matter of federal law." See 44 FR 28691. This did not obviate the deficiency in the UBR. Also, EPA's interpretation of that time—that exemptions granted by Utah would not affect Federal enforcement—could be questioned and rejected in court. While some commenters state that EPA's enforcement discretion would not be affected by the Utah executive secretary's decision, others offer no such concession. See, *e.g.,* Utah Manufacturers Association, *et al.,* comment letter at 5 versus Utah Industry Environmental Coalition, *et al.,* comment letter at 14, which are in the docket for this action. Furthermore, Phillips Petroleum asserted in a 1997 EPA enforcement action that Utah's non-violation determinations under the UBR were binding on EPA.[18]

While we disagree with the commenter that a SIP call is only allowed where there is new external information that the SIP is invalid,[19] facts since our 1980 approval, such as arguments made in enforcement cases contrary to EPA's interpretation, would certainly qualify as new information justifying a SIP call. Among other things, the UBR is substantially inadequate because it is burdened by the uncertainty of whether EPA or citizens may pursue independent enforcement where the Utah executive secretary decides an excess emission is not a violation.

(h) Comment: Commenters state that EPA mischaracterizes the Utah UBR in that Utah's rule does not allow for outright exemptions from BACT or LAER limits, and does not undermine protection of the NAAQS, PSD increments, or visibility.

Response: We do not agree. Under the UBR, excess emissions resulting from unavoidable breakdowns are not violations. We consider that an outright exemption, which prevents enforcement action where, for example, it may be needed to protect the NAAQS. The commenter's premise—that unavoidable breakdowns will occur regardless of the rule—assumes a continued right to pollute regardless of whether such emissions might undermine the very purpose of the SIP—attainment and maintenance of the NAAQS. It also assumes that the UBR provides adequate incentives to avoid malfunctions and protect the NAAQS. We do not agree. See our other responses.

(i) Comment: A commenter argues that the UBR does not preclude injunctive relief. The commenter cites UDAQ's ability to pursue injunctive relief if it decides the excess emissions were not caused by an unavoidable breakdown.

Response: The commenter says nothing about EPA or citizen authority where UDAQ decides, erroneously or not, that the excess emissions were caused by an unavoidable breakdown, or where the excess emissions were in fact caused by an unavoidable breakdown as defined in the UBR. It is our interpretation that injunctive relief must be preserved regardless of the State determination and regardless of the cause of the exceedance. Protection of the NAAQS should not be subservient to a source's desire to continue operating as it has, or its "need" to continue polluting. As we have explained in our various policy statements over the years, all exceedances must be treated as violations to allow protection of the NAAQS, and no defense to injunctive relief is appropriate. See the 1982, 1983, and 1999 Policies.

Also, as to UDAQ's enforcement discretion, we find it likely that the UBR would prevent the State from obtaining injunctive relief where the breakdown meets the criteria in the UBR to be classified as unavoidable.

(j) Comment: Commenters state that contrary to EPA's assertion, the discretion afforded the UDAQ executive secretary under the unavoidable breakdown rule does not limit EPA's ability to overfile or a third party's ability to file a citizen's suit. Another commenter states that EPA lacks a reasonable basis to presume "uncertainty" about reserved enforcement authority.

Response: The UBR language in question reads: "The submittal of such information shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action."

[18] In 1997, EPA initiated an enforcement action against the Phillips Petroleum refinery in Davis County, Utah when the State declined to pursue enforcement. Among other things, EPA alleged that Phillips had violated its one-hour emission limit contained in the Utah SIP for the Salt Lake County PM_{10} nonattainment area. The State, with little or no apparent analysis, decided that all or nearly all of the more than 1,000 exceedances EPA cited in its complaint against Phillips were caused by unavoidable breakdowns and were not violations under the UBR. Phillips alleged in pleadings that the State's decision precluded EPA enforcement as a matter of law. We disagreed with the State's decision and with Phillips' arguments, but the court never decided the issue because a settlement was reached. We have included in the docket for this action various pleadings and documents from the Phillips enforcement case that reflect the facts cited herein.

[19] We also may have been justified using our authority under 110(k)(6) to revise the rule, but have decided the better course here is to provide the State the opportunity to revise the SIP through the SIP call process.

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The plain language appears to grant the executive secretary the authority to determine whether excess emissions constitute a violation or not. Our approval of that language could be construed by a court as ceding that authority to the State. A court could conclude that it should not resort to the interpretation we offered with our 1980 approval—that an exemption granted by the Utah executive secretary would not apply as a matter of Federal law—because the language of the regulation is clear on its face.[20] Also, we did not repeat our 1980 interpretation in subsequent approvals. In addition, representations made by the commenters here would not bind them or other entities in subsequent enforcement actions.

The State suggests that it would not "forget EPA's interpretation of the law." But, in its comments, the State does not say it agrees with EPA's interpretation or that it or another entity would not argue against EPA's interpretation in an enforcement action. As noted, at least one defendant—Phillips Petroleum—has already argued against our 1980 interpretation. To our knowledge, the State has never provided an interpretation that the UBR was not intended to and does not have a preclusive effect on EPA or citizen enforcement.

At best, the UBR language is ambiguous, and in the face of this ambiguity, a court could defer to the State's interpretation, whose interpretation of the rule is currently unknown. Ambiguous language can undermine the purpose of the SIP and compliance with CAA requirements.[21]

The commenters would have us remain silent in face of the uncertainty caused by the UBR language. The reasonable course is to require the State through our SIP call authority to change the UBR to remove its potential impediment to our and citizens' exercise of our independent enforcement authority under CAA sections 113 and 304.[22] The UBR's threat to our and citizens' independent enforcement authority under the CAA renders the SIP substantially inadequate.

The State suggests that our action is unreasonable because it has taken us so long to recognize and address the problem. As we noted above, issuance of the 1999 Policy spurred our re-examination of the Utah SIP. In particular, the 1999 Policy clarified that SIPs should not include provisions whereby a State's enforcement decision would "bar EPA's or citizens' ability to enforce applicable requirements." 1999 Policy at 3. The Phillips Petroleum case also influenced us. The State does not mention that we attempted to address our concerns cooperatively with the State since shortly after the 1999 Policy was issued, and for many years thereafter.

(k) Comment: One commenter suggests that the potential preclusive effect of the executive secretary's violation/non-violation determinations under the UBR may be "in keeping with the role given to states in SIP matters."

Response: We disagree. Sections 113 and 304 of the Act clearly provide independent enforcement authority to EPA and citizens. While section 304 limits citizens' authority where a State or EPA "has commenced and is diligently prosecuting a civil action," nothing in the CAA suggests that Congress intended or required States to have exclusive authority to determine whether an exceedance constitutes a violation. Nor is there any rational reason EPA should be relegated, as the commenter suggests, to an action under section 113(a)(2) of the Act—to essentially wait for "widespread" dereliction of duty on Utah's part—to correct this problem in the UBR. Our use of SIP call authority to correct the problem is reasonable. We have responsibility to implement and interpret the CAA, and we reject the commenter's interpretation that the "balance of authority in Utah's SIP and the UBR is in keeping with the role given to states in SIP matters." Contrary to the commenter's suggestion, we are not required to wait for a court to determine in the context of an enforcement action whether the potential preclusive effect of the UBR language is consistent with the CAA. Congress did not hamstring us in that way; instead it provided us with authority to issue a SIP call to address substantial inadequacies in the SIP.

(l) Comment: Commenters argue that EPA's preferred approach would have no impact on emissions because unavoidable breakdowns are by their nature unavoidable regardless of the rule governing such events.

Response: First, as we explain above, the UBR precludes injunctive relief when the excess emissions fall within the UBR's coverage. As we have explained, this is inconsistent with the CAA. Commenters do not address this, but instead appear to assume the need to pollute trumps protection of the NAAQS.

Second, how "unavoidable" is defined makes a difference. Depending on the definition, different incentives with respect to design, operation, and maintenance are created. We find that the criteria contained in the UBR are not as extensive or rigorous as the criteria in the 1999 Policy for asserting an affirmative defense to penalty actions. For example, the UBR indicates that breakdowns caused by "poor maintenance" or "careless operation" or "any other preventable upset condition or preventable equipment breakdown" shall not be considered unavoidable breakdowns. Unlike the UBR, the 1999 Policy specifically addresses potential design flaws in addition to issues with maintenance and operation: "The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The lack of specificity in the UBR could lead a court to conclude that the rule was not intended to reach back to the design of the facility or its control equipment. In addition, the UBR does not indicate who has the burden of proof regarding claims of unavoidable breakdown. The 1999 Policy clearly provides that the source has the burden to prove the elements of the affirmative defense to penalties.

Third, who decides whether a breakdown qualifies as unavoidable makes a difference. As we have indicated, the UBR appears to give the Utah executive secretary exclusive authority to determine whether a violation has occurred—*i.e.,* whether a breakdown was an unavoidable breakdown. As noted, potential preclusion of EPA and citizen enforcement reduces the incentive for sources to improve their design, maintenance, and operation practices.

(m) Comment: Commenters assert that Utah's Unavoidable Breakdown Rule is generally consistent with EPA's criteria in the 1999 Policy and provide their own side-by-side comparison of the

[20] See, *e.g., U.S.* v. *Ford Motor Co.,* 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S.* v *General Motors Corp.,* 702 F.Supp. 133 (N.D. Texas 1988) (EPA could not pursue enforcement of SIP emission limits where States had approved alternative limits under procedures EPA had approved into the SIP); *Florida Power & Light Co.* v. *Costle,* 650 F.2d 579, 588 (5th Cir. 1981) (EPA to be accorded no discretion in interpreting State law). While we do not agree with the holdings of these cases, we think the reasonable course is to eliminate any uncertainty about reserved enforcement authority by requiring the State to revise or remove the unavoidable breakdown rule from the SIP.

[21] In approving Colorado's affirmative defense rule for startup and shutdown, we specifically disapproved one section of the rule that we felt could have been construed to cede authority to Colorado to determine whether a source had established the elements of the affirmative defense. 71 FR at 8959 (February 22, 2006).

[22] The UBR could be easily revised to address the problem. The sentence in question could be changed to read, "The submittal of such information shall be used by the executive secretary in determining whether to pursue enforcement action."

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1999 Policy's affirmative defense provisions to the relevant provisions in Utah's Unavoidable Breakdown Rule. Commenters state that this comparison shows the criteria contained in the 1999 Policy are addressed "in all material respects" by the Utah UBR, and that it is therefore difficult to understand EPA's conclusion of substantial inadequacy.

Response: The commenters have not alleviated our concerns. In our proposal and elsewhere in this notice, we identify fundamental flaws in the UBR that render the UBR substantially inadequate regardless of the criteria for determining whether a breakdown is unavoidable.

We also disagree with the commenters that the criteria are equivalent. We find that the UBR lacks the specificity contained in the 1999 Policy. For example, the 1999 Policy indicates that the source needed to use off-shift labor and overtime, to the extent practicable, to make repairs and needed to make repairs expeditiously when it knew or should have known that emissions limits were being exceeded. This specificity helps define the more general admonition in the policy that the source needs to employ good practices for minimizing emissions. We have already noted that the UBR criteria do not appear to address proper design of the facility, and they do not require reporting of all breakdowns. Also, the UBR does not require that the owner or operator document its actions in response to the breakdown with signed, contemporaneous operating logs.

Finally, we note that one significant difference between the affirmative defense described in the 1999 Policy and the UBR is that the affirmative defense recognizes that a violation of the emissions standard has occurred and provides relief only for actions for penalties. The UBR provides that the excess emissions are excused and would prohibit any action for penalties and any action for injunctive relief.

(n) Comment: The terms of the UBR are analogous to the criteria that EPA's 1982 and 1983 policies provided for analyzing whether a malfunction ought to spur enforcement action under the enforcement discretion approach. The UBR does not provide an automatic exemption as described in those policies.

Response: See our previous response. Also, assuming the comment regarding the criteria is relevant, we disagree with the commenter. The UBR is inconsistent with the 1982 and 1983 Policies in several respects. Specifically, the 1983 Policy states that "EPA can approve SIP revisions which incorporate the 'enforcement discretion approach.' Such an approach can require the source to demonstrate to the appropriate State agency that the excess emissions, **though constituting a violation**, were due to an unavoidable malfunction. **Any malfunction provision must provide for the commencement of a proceeding to notify the source of its violation and to determine whether enforcement action should be undertaken for any period of excess emissions**." (Emphasis added). The UBR does not require the State to initiate a proceeding to notify the source of its violation. Moreover, contrary to the foregoing, the UBR specifically provides that the executive secretary may decide that the excess emissions are not a violation, which could preclude enforcement action by EPA or citizens as well as injunctive relief. Finally, the 1999 Policy clarified the meaning of the term "automatic exemption." As we explain elsewhere, the UBR clearly provides an automatic exemption.

(o) Comment: EPA fails to acknowledge Utah Rule R307–107–1, 'Application', which states "Breakdowns that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered unavoidable breakdown." Therefore, commenters state EPA's complaint claiming that "the rule's exemption reduces a source's incentive to design, operate, and maintain its facility to meet emission limits at all times" is without merit.

Response: We disagree. First, the quoted language is part of the criteria contained in the UBR. See our responses to comments comparing the criteria of the UBR to the criteria contained in our SSM policies. Second, considered as a whole, we conclude that the UBR reduces a source's incentive to meet its emission limits at all times. We have explained the basis for our view in our responses to previous comments. In particular, the rule appears to give the executive secretary exclusive authority to decide whether a breakdown meets the criteria under the UBR and thus, whether an exceedance is a violation.

(p) Comment: Commenters assert that EPA's SIP call is inconsistent with the Federal-State partnership as contemplated in the CAA. Commenters state that the CAA does not contemplate mandates to require a State to modify its SIP, without regard to environmental or air quality benefits, simply because EPA has a particular policy it wants to advance.

Response: We are not acting at odds with the CAA's contemplated Federal-State partnership. The CAA establishes minimum requirements for SIPs and does not, as the commenters indicate, limit EPA's action to simply reviewing a SIP to determine whether it will provide for attainment and maintenance of the Act. Section 110(a)(2) provides a specific list of obligations that a State must meet and we are acting to ensure the Utah SIP meets those minimum requirements. In particular, we are acting to ensure that SIP emission limits, and related permit limits, which are for the purpose of attaining and maintaining the health-based air quality standards, protecting increments, and improving visibility in national parks and wilderness areas, can be enforced at all times as contemplated by sections 110 and 302 of the Act. We are also acting to ensure that Utah's SIP does not undermine delegated national standards like NSPS and NESHAPS.

(q) Comment: It is left to the states, and not EPA, to choose how they will achieve assigned emission reduction levels. Section 110 allows for a SIP call only if the state is not achieving NAAQS. As long as a state achieves the applicable air quality standards, Congress did not intend EPA to require a plan revision merely because it disagrees with the measure that a state implements.

Response: We are not interfering with Utah's selection of SIP emissions limits. We are acting to ensure that one element of the SIP—the UBR—is modified or removed so that it does not interfere with one of the minimum requirements of the CAA—that the SIP limits relied on to attain and maintain the NAAQS, protect increments, and protect visibility apply and be enforceable at all times. Furthermore, in the context of NSPS and NESHAPS, to which the UBR also applies, it is up to EPA to select emission limits (and any exemptions), not the State.

We disagree that section 110 only allows a SIP call if the State is not achieving the NAAQS. One commenter cites *Virginia* v. *EPA,* 108 F.3d 1397, 1410 (DC Cir. 1997) to support its view, but that court was addressing whether EPA could impose specific control requirements through its NO_X SIP call and did not reach the holding the commenter alleges. Such a holding would be inconsistent with the plain language of section 110 and the legislative history. Congress specifically amended CAA section 110(a)(2)(H) in 1977 to add the phrase, "or to otherwise comply with any additional requirements established under this chapter" to the language, "is substantially inadequate to attain the national ambient air quality standard." CAA section 110(k)(5), added in 1990, is

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in accord. In other words, there are other instances in which a SIP call may be issued. Fundamentally, SIP limits must be enforceable and apply continuously to meet CAA requirements (CAA sections 110(a)(2)(A) and (C) and 302(k)), and where these requirements are not met, a SIP call is warranted.

Furthermore, as noted already, a number of areas in Utah are designated nonattainment and have violated, or are violating various NAAQS.

(r) Comment: Some commenters assert that allowing EPA to proceed with a SIP call here in the absence of data showing the UBR has caused specific NAAQS violations could set the stage for unfettered, arbitrary EPA SIP calls with respect to any number of state rules. A commenter asserts that EPA's SIP call runs counter to past EPA SIP calls. Another asserts that EPA erroneously finds that the SIP call does not have Federalism implications. A commenter references an EPA action under CAA section 110(k)(6) with respect to a Nevada malfunction rule to argue that the SIP call is arbitrary.

Response: We explain above why we think we have a valid basis for the SIP call. We note that we have rarely issued SIP calls, but in any event, the commenters' fears about potential future EPA SIP calls are irrelevant to this action. The question is whether we have reasonably concluded that the UBR renders the Utah SIP substantially inadequate as provided under 110(k)(5). We conclude we have. Whether other SIPs or SIP rules are substantially inadequate will depend on the language of those rules and facts relevant to them. The comment that this SIP call is inconsistent with past EPA SIP calls is also inaccurate. While in some cases EPA has issued SIP calls to address specific violations of the NAAQS, EPA has also issued a SIP Call notifying certain States that their SIPs were inadequate to comply with sections 110(a)(2)(A) and (C) of the CAA because the SIPs could be interpreted to limit the types of evidence or information that could be used for determining compliance with and establishing violations of emissions limits. See 62 FR 8314, 8327 (February 24, 1997); October 20, 1999 letter from William Yellowtail to Governor Marc Racicot. We stand by our conclusion that the SIP call does not have Federalism implications within the meaning of Executive Order 13132; we are issuing a SIP call as required by sections 110(a)((2)(H) and 110(k)(5) of the CAA, following a finding of substantial inadequacy. Finally, regarding the vague reference (without citation) to EPA Region 9's proposal to address issues with the Nevada SIP using the authority of CAA section 110(k)(6) (not section 110(a)(2)(H) or 110(k)(5)), we are unable to ascertain the relevance. Section 110(k)(6) provides an additional tool to ensure that SIPs are consistent with the requirements of the Act, and whether it could have been used in this instance does not implicate whether sections 110(a)(2)(H) and 110(k)(5) are appropriate tools to use. To the extent the commenter is suggesting that our SIP call is arbitrary because EPA Region 9 has not finalized its proposed 110(k)(6) action, we respectfully disagree.

(s) Comment: Utah's UBR is "clearly less stringent than the CAA and EPA rules and guidance."

Response: We agree that the UBR does not meet minimum CAA requirements and thus is substantially inadequate.

C. Sanctions

(a) Comment: Commenter asserts that EPA fails to meet the requirements to impose mandatory sanctions under the CAA because sanctions can only be triggered by a "finding of substantial inadequacy." The commenter also asserts that sanctions are unwarranted because Utah has always acted in good faith to involve all stakeholders, including EPA, in an attempt to craft a clarified rule. The commenter expresses concern that sanctions would harm Utah's economy in these difficult economic times and indicates that EPA" should be circumspect in brandishing its sanctions club."

Response: This rulemaking action finalizes our finding of substantial inadequacy under CAA section 110(k)(5), and the State is required to submit a SIP revision in response to the finding of substantial inadequacy. If the State fails to submit the required SIP, the 18-month period before mandatory sanctions apply under section 179 will be triggered.

Under CAA section 179, whether or not Utah has acted in good faith to change the UBR is irrelevant; we lack authority to forestall the mandatory sanctions if EPA determines Utah has failed to respond to the SIP call or submits an incomplete or disapprovable SIP. Utah, however, has the power to avoid sanctions and any economic impacts to the State by submitting an approvable SIP addressing our SIP call. We have provided additional time, at the State's request, for the State to make its submission. Finally, as we noted in our proposal, other States in the Region have changed their SSM rules and gained EPA's approval.

(b) Comment: If EPA were to impose statewide sanctions, it would violate 40 CFR 52.30(b) if the criteria of 40 CFR 52.30(c) are met by one or more political subdivisions within the State.

Response: No commenter has suggested that a political subdivision within Utah meets the criteria of 40 CFR 52.30(c). However, as described in the "Final Action" section of this action, we are deferring a decision on whether to impose sanctions under section 110(m) and will consider any comments on the issue of imposing sanctions under section 110(m) if and when we take final action on this issue in the future.

(c) Comment: EPA's discretion under the CAA "must not be unreasonable or arbitrary. Since the EPA has not identified any reasons upon which consideration of statewide sanctions was based, the EPA has not provided adequate notice to the public of whether the exercise of discretionary authority under CAA Section 110(m) is appropriate in this case."

Response: While we provided a reason in our proposal—namely, that the UBR applies statewide—we are deferring a decision on whether to impose discretionary sanctions.

(d) Comment: Transportation and mobile sources should not be punished for a rule governing industry operations. The commenter therefore recommends that EPA "include a 'Protective finding' in the SIP call for mobile sources," which "would prevent the automatic 'freeze' of conformity and allow for operations to continue for at least two years after an EPA disapproval takes effect." Another commenter expresses concern that sanctions would negatively impact transit services.

Response: EPA does not intend to "punish" anyone. The purpose of sanctions is to encourage corrective action by the State. The applicable sanctions are specified by Congress, not EPA. As noted above, sanctions can be avoided altogether by Utah's timely submission of an approvable revision to the SIP. Regarding the suggestion that we provide a protective finding, our interpretation is that disapproval of any rule submitted in response to this SIP call would not result in a conformity freeze because the revision at issue is not a control strategy SIP revision governed by 40 CFR 93.120. The metropolitan planning organization could continue to make conformity determinations even after such a disapproval. Also, for the same reason, even if highway sanctions are triggered by future disapproval of a revised breakdown rule, a conformity lapse would not occur because we would not be disapproving a control strategy SIP revision. If highway sanctions are triggered, certain projects, such as transit projects and highway safety and

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maintenance projects, could still go forward. See 61 FR 14363 (April 1, 1996), which contains the Federal Highway Administration's sanction exemption criteria policy.

(e) Comment: EPA sanctions on transportation funding might slow improvements to transportation projects across Utah, potentially resulting in diminished air quality in both attainment and nonattainment areas across the state. Sanctions on transportation funding might also stifle growth.

Response: See our previous responses. As noted, the sanctions would be mandatory in certain areas. The sanctions can be avoided through appropriate State action, and certain projects can proceed even if highway sanctions are triggered. As noted, we are deferring a decision on whether to impose discretionary sanctions under CAA section 110(m).

(f) Comment: EPA should not impose statewide sanctions, because this would punish portions of the state that are in compliance with the CAA.

Response: As noted, we are deferring a decision on whether to impose the sanctions under CAA section 110(m).

(g) Comment: Applying sanctions only in nonattainment areas rather than statewide would be inconsistent with the CAA, as the intent of the CAA "is not simply to attain the NAAQS and other CAA requirements, but to maintain compliance."

Response: As noted, we are deferring a decision regarding the application of sanctions statewide. However, we note that the CAA provides us with discretion to expand the scope of the sanctions; it does not require we do so.

(h) Comment: EPA should apply sanctions if Utah fails to correct the UBR.

Response: As noted, mandatory sanctions will apply if the relevant triggering events occur. We are deferring a decision regarding the application of discretionary sanctions. See the "Final Action" section of this action, above.

D. Time Period for Response to SIP Call

(a) Comment: Utah requests that EPA grant the entire 18 months allowed by section CAA 179(a). Twelve months is an extremely short time to gather stakeholders, build consensus, draft a proposed rule, and allow for public participation, especially considering the considerable workload UDAQ faces aside from this SIP Call. Utah states that a response time of less than 18 months may cause a change in the prioritization and possibly compromise other air quality efforts by the State including the development of its Regional Haze Rule, the development of its $PM_{2.5}$ SIP revision, and efforts to meet the lower ozone standard. Another commenter believes that 12 months is an appropriate response period, while another argues for six months.

Response: In our proposed rulemaking action (see 75 FR 70893), we proposed that 12 months would be an appropriate length of time for Utah to respond to this SIP call. We viewed this as an acceptable time frame given the history with the State of Utah regarding the UBR and the time it has taken other States to submit SIPs addressing SSM rules. We have considered the State's comments and appreciate the resource burden a 12-month time frame would pose for UDAQ in view of the State's current work with its Regional Haze SIP revision, the development of its $PM_{2.5}$ attainment SIP revision (for three $PM_{2.5}$ nonattainment areas), and the potential for additional resource requirements to meet EPA's forthcoming reconsidered 8-hour ozone NAAQS. We also conclude that six months may not provide the State with sufficient time to revise the rule and still provide a reasonable opportunity for public input. Therefore, as CAA section 110(k)(5) grants EPA the authority to establish "reasonable deadlines" up to 18 months for a State to respond to a SIP call, and in view of the resource requirements that this SIP call will impose on the State in addition to those noted above, we have decided to grant the full 18 months for response as allowed by the CAA. We consider this a reasonable time period for the State to revise the rule, provide for public input, process the SIP revision through the State's procedures, and submit the SIP revision to us. We encourage the State to work with us on appropriate rule language and to submit the SIP revision as soon as possible.

E. Miscellaneous Comments

(a) Comment: The commenters support EPA's action, and believe the action benefits the health and well-being of Utah citizens.

Response: We acknowledge receipt of the comment and the support for our proposal.

(b) Comment: Utah's UBR does not give industry incentive to design, operate and maintain equipment to meet emission limits at all times.

Response: We agree.

(c) Comment: The Utah UBR prevents the opportunity for citizen enforcement or injunctive relief.

Response: We agree that the UBR may preclude citizen enforcement or injunctive relief.

(d) Comment: EPA has notified Utah of the need to change their UBR on many occasions.

Response: We agree.

(e) Comment: SSM plans should be part of Title V permits so that information such as emission limits will be available to the public.

Response: This comment is not directly relevant to our action today, which does not address the treatment of SSM plans in Title V permits.

(f) Comment: EPA should include Utah R307–415–(7)(g) "Startup Shut down and Malfunction" in its analysis.

Response: Our review indicates that Utah rule R307–415–(7)(g) is part of Utah's Title V operating permit regulations and is titled "Permit Revision: Reopening for Cause." Utah's Title V regulations are separate from and not approved as part of the SIP. Thus, our SIP call authority is not applicable to those regulations. We were unable to find any discussion of startup, shutdown, or malfunction in R307–415–(7)(g) and, thus, are unable to respond more extensively to the comment.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

This action only requires the State of Utah to revise Utah rule R307–107 to address requirements of the CAA. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because this action does not impose any requirements on small entities.

Since the only costs of this action will be those associated with preparation and submission of the SIP revision, EPA has determined that this action does not include a Federal mandate that may result in expenditures of $100 million or more to either State, local, or Tribal governments in the aggregate, or to the private sector in any one year. Accordingly, this action is not subject to the requirements of sections 202 or 205 of the unfunded mandates reform act (UMRA).

In addition, since the only regulatory requirements of this action apply solely to the State of Utah, this action is not subject to the requirements of section

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203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

Since this action imposes requirements only on the State of Utah, it also does not have Tribal implications. It will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action also does not have Federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it will simply maintain the relationship and the distribution of power and responsibilities between EPA and the States as established by the CAA. This SIP call is required by the CAA because EPA has found the current SIP is substantially inadequate to attain or maintain the NAAQS or comply with other CAA requirements. Utah's direct compliance costs will not be substantial because the SIP call requires Utah to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements.

EPA interprets Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard, but instead requires Utah to revise a State rule to address requirements of the CAA.

Section 12 of the National Technology Transfer and Advancement Act of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with the National Technology Transfer and Advancement Act, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. In making a finding of a SIP deficiency, EPA's role is to review existing information against previously established standards. In this context, there is no opportunity to use VCS. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), since it only requires the State of Utah to revise Utah rule R307–107 to address requirements of the CAA.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 17, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 31, 2011.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2011–9215 Filed 4–15–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2008–0821; FRL–9297–3]

RIN 2050–AG50

Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure (SPCC) Rule—Amendments for Milk and Milk Product Containers

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA or the Agency) is amending the Spill Prevention, Control, and Countermeasure (SPCC) rule to exempt all milk and milk product containers and associated piping and appurtenances from the SPCC requirements. The Agency is also removing the compliance date requirements for the exempted containers.

DATES: This final rule is effective on June 17, 2011.

ADDRESSES: The public docket for this rulemaking, Docket ID No. EPA–HQ–OPA–2008–0821, contains the information related to this rulemaking, including the response to comments document. All documents in the docket are listed in the index at *http://www.regulations.gov*. Although listed in the index, some information may not be publicly available, such as Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the EPA docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Public Reading Room is 202–566–1744, and the telephone number to make an appointment to view the docket is 202–566–0276.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 800–424–9346 or TDD at 800–553–7672 (hearing impaired). In the Washington, DC metropolitan area, contact the Superfund, TRI, EPCRA, RMP, and Oil

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United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

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United States Code Annotated Currentness

Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

➞➞ § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

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(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

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(c)

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

****

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance

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with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required

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under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the

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reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680; amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

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Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means--

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(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C.A. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

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(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

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In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall--

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider--

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

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(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that--

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either--

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

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(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing,

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that--

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure--

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of con-

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tinuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of--

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to--

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date--

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize

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emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 111, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1683; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, Pub.L. 95-95, Title I, § 109(a)-(d)(1), (e), (f), Title IV, § 401(b), 91 Stat. 697 to 703, 791; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(7) to (9), 91 Stat. 1399; Nov. 9, 1978, Pub.L. 95-623, § 13(a), 92 Stat. 3457; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(e) to (g), Title III, § 302(a), (b), Title IV, § 403(a), 104 Stat. 2467, 2574, 2631.)

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United States Code Annotated Currentness

Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7412. Hazardous air pollutants

(a) Definitions

For purposes of this section, except subsection (r) of this section--

****

(6) Hazardous air pollutant

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

****

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source

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emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

****

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the

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Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

§ 7413. Federal enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)--

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as “period of federally assumed enforcement”), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by--

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(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may--

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or ap-

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plicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may--

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies; [FN1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

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Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly--

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter [FN2]

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shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury--

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

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(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person--

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver,

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permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator

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and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index, as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order--

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollu-

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tion control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term “operator”, as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term “a person” shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term “a person” shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

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(July 14, 1955, c. 360, Title I, § 113, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1686; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(b), (c), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(a)(1) to (3), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 111, 112(a), 91 Stat. 704, 705; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(10) to (21), (b)(1), 91 Stat. 1400, 1404; July 17, 1981, Pub.L. 97-23, § 2, 95 Stat. 139; Nov. 15, 1990, Pub.L. 101-549, Title VII, § 701, 104 Stat. 2672.)

[FN1] So in original. The semicolon probably should be a comma.

[FN2] So in original. Probably should be followed by a comma.

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

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Westlaw

United States Code Annotated Currentness

Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [FN1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air) [FN2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

[FN1] So in original. Probably should be “anticipated”.

[FN2] So in original. Section was enacted without an opening parenthesis.

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all--

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(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

➡§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable in- crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	

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Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable in- crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable in- crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to--

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(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

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§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which

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is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable in crease (in micrograms per cubic meter)

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Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE

[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term “high terrain area” means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term “low terrain area” means any area other than a high

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terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations--

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

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➡**§ 7479. Definitions**

For purposes of this part--

(1) The term “major emitting facility” means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants,

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primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

Subpart II. Visibility Protection (Refs & Annos)

➡ **§ 7491. Visibility protection for Federal class I areas**

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

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(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for--

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall--

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including--

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

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In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a “nondiscretionary duty” of the Administrator.

(g) Definitions

For the purpose of this section--

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term “manmade air pollution” means air pollution which results directly or indirectly from human activities;

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(4) the term "as expeditiously as practicable" means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term "mandatory class I Federal areas" means Federal areas which may not be designated as other than class I under this part;

(6) the terms "visibility impairment" and "impairment of visibility" shall include reduction in visual range and atmospheric discoloration; and

(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7602. Definitions

When used in this chapter--

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means--

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

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(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.. [FN1]

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

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(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) Indian tribe.--The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.--The term "VOC" means volatile organic compound, as defined by the Administrator.

(t) PM-10.--The term "PM-10" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS and CTG.--The term "NAAQS" means national ambient air quality standard. The term "CTG" means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.--The term "NO_x" means oxides of nitrogen.

(w) CO.--The term "CO" means carbon monoxide.

(x) Small source.--The term "small source" means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) Federal implementation plan.--The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an

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inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) Stationary source.--The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 302, formerly § 9, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992; amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, § 15(a)(1), (c)(1), 84 Stat. 1710, 1713; Aug. 7, 1977, Pub.L. 95-95, Title II, § 218(c), Title III, § 301, 91 Stat. 761, 769; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(76), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(d)(4), 107(a), (b), 108(j), 109(b), Title III, § 302(e), Title VII, § 709, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

[FN1] So in original.

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

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(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court de-

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termines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or [FN1]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),, [FN2]section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [FN3] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit

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term or condition, and any requirement to obtain a permit as a condition of operations. [FN4]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 304, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1706; amended Aug. 7, 1977, Pub.L. 95-95, Title III, § 303(a)-(c), 91 Stat. 771, 772; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(77), (78), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title III, § 302(f), Title VII, § 707(a)-(g), 104 Stat. 2574, 2682, 2683.)

[FN1] So in original. The word “or” probably should not appear.

[FN2] So in original.

[FN3] So in original. The semicolon probably should be comma.

[FN4] So in original. The period probably should be a comma.

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Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7607. Administrative proceedings and judicial review

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(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,, [FN2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [FN2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

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Utah Admin. R. 307-107

C

Utah Administrative Code Currentness
Environmental Quality
R307. Air Quality.
➡➡ **R307-107. General Requirements: Unavoidable Breakdown.**

R307-107-1. Application.

R307-107 applies to all regulated pollutants including those for which there are National Ambient Air Quality Standards. Except as otherwise provided in R307-107, emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations. If excess emissions are predictable, they must be authorized under the variance procedure in R307-102-4. Breakdowns that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered unavoidable breakdown.

R307-107-2. Reporting.

A breakdown for any period longer than 2 hours must be reported to the executive secretary within 3 hours of the beginning of the breakdown if reasonable, but in no case longer than 18 hours after the beginning of the breakdown. During times other than normal office hours, breakdowns for any period longer than 2 hours shall be initially reported to the Environmental Health Emergency Response Coordinator, Telephone (801) 536-4123. Within 7 calendar days of the beginning of any breakdown of longer than 2 hours, a written report shall be submitted to the executive secretary which shall include the cause and nature of the event, estimated quantity of pollutant (total and excess), time of emissions and steps taken to control the emissions and to prevent recurrence. The submittal of such information shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action.

R307-107-3. Penalties.

Failure to comply with the reporting procedures of R307-107-2 will constitute a violation of these regulations.

R307-107-4. Procedures.

The owner or operator of an installation suffering an unavoidable breakdown shall assure that emission limitations and visible emission limitations are exceeded for only as short a period of time as reasonable. The owner or operator shall take all reasonable measures which may include but are not limited to the immediate curtailment of production, operations, or activities at all installations of the source if necessary to limit the total ag-

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gregate emissions from the source to no greater than the aggregate allowable emissions averaged over the periods provided in the source's approval orders or R307. In the event that production, operations or activities cannot be curtailed so as to so limit the total aggregate emissions without jeopardizing equipment or safety or measures taken would result in even greater excess emissions, the owner or operator of the source shall use the most rapid, reasonable procedure to reduce emissions. The owner or operator of any installation subject to a SIP emission limitation pursuant to these rules shall be deemed to have complied with the provisions of R307-107 if the emission limitation has not been exceeded.

R307-107-5. Violation.

Failure to comply with curtailment actions required by R307-107-4 will constitute a violation of R307-107.

R307-107-6. Emissions Standards.

Other provisions of R307 may require more stringent controls than listed herein, in which case those requirements must be met.

KEY: air pollution, breakdown*, excess emissions*

September 15, 1998

Notice of Continuation September 4, 2008

19-2-104

U.A.C. R307-107, UT ADC R307-107

Current through October 1, 2011.

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Fwd: Unavoidable Breakdown Rule SIP Call - DAQ path forward
Dave Mcneill
to:
Monica Morales
06/15/2011 10:46 PM
Hide Details
From: "Dave Mcneill" <dmcneill@utah.gov>

To: Monica Morales/R8/USEPA/US@EPA

Monica,

I just wanted to be sure that you got a copy of this note we sent out to our stakeholders. Greatfully, now it looks like we can move forward in a productive way on this one. Joel has been working with your staff on it - I think we can get it completed pretty quickly now.

Dave

>>> Bryce Bird 06/15/11 4:54 PM >>>
Dear Stakeholder,

I would like to extend my appreciation for your participation in the critical initial stakeholder process to review potential solutions to EPA's State Implementation Plan (SIP) Call on Utah's Unavoidable Breakdown Rule. This process has provided me with valuable insight into our constituency position on this matter.

The EPA, in its SIP Call, offered Utah several options, i.e., challenge the SIP Call, take no action, or revise the rule per EPA guidance. While Utah, with neighboring states, has informed EPA that ruling by policy is detrimental to our planning process, we had to seriously consider the disruptive nature of a legal challenge and deviation of valuable resources from our important work on SIP development and streamlining efforts. We also considered the ramifications to our communities from potential sanctions. At the end of our deliberations, we determined that the best course of action is to proceed with a rule revision that is crafted to meet the needs of the state while meeting the congressional intent of the Clean Air Act, that can be approved by EPA. We will not be challenging EPA's determination through the mechanism provided in Section 307 of the Clean Air Act. This outcome was

generally supported through information gained through the stakeholder process.

The Division's Planning Branch staff will convene a meeting of the stakeholder group in preparation for rule-making by the Air Quality Board to meet EPA's 18-month time-line to address the SIP Call. As per our established protocol, stakeholders will be asked to significantly contribute to the rule development process.

Sincerely,

Bryce C. Bird

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